SEXUAL EXPLOITATION AND ABUSE BY UN PEACEKEEPERS: TOWARDS A HYBRID SOLUTION

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ABSTRACT

Allegations of sexual exploitation and abuse against UN peacekeepers over the past decade prompted a "zero-tolerance" policy response from high-level UN officials. To facilitate this policy, the UN has initiated and implemented various preventative and responsive measures. Despite the raft of reforms, it is the troop-contributing countries (TCCs) which have exclusive criminal jurisdiction over their military contingent members and the current framework has been criticised for failing to ensure accountability of offenders.

In this thesis I explore alternative ways in which the United Nations can improve accountability for sexual exploitation and abuse committed by military contingent members within its peacekeeping personnel. Applying a feminist lens, I assess these options guided by three underlying principles; justice being seen to be done, host state ownership, and UN leadership. I first discuss the concepts of sexual exploitation and abuse as defined by the UN. Second, I explore whether TCCs could or should be sanctioned for failing to exercise criminal jurisdiction. Third, I investigate alternative ways to hold individual peacekeepers to account and fourth, I consider the role victims of sexual exploitation and abuse have to play and the remedies to which they may be entitled.

I conclude that it is time for the UN to implement a different solution and remove TCCs' exclusive criminal jurisdiction. I argue that a hybrid court for peacekeepers is the better alternative to hold individual perpetrators to account. A hybrid court would incorporate host state ownership and provide a clear structure for TCC cooperation and UN leadership. Additionally, victim inclusivity would be an important feature of such a court. Victims are entitled to effective remedies and I put forward recommendations for targeted and transformative reparations. I also recommend a re-draft of the definition of "sexual exploitation" to better reflect the primary targeted conduct of survival sex.

PART ONE: SEXUAL EXPLOITATION AND ABUSE: ACCOUNTABILITY OF UNITED NATIONS PEACEKEEPERS

INTRODUCTION: THE PROBLEM OF HOLDING UN PEACEKEEPERS TO ACCOUNT FOR ACTS OF SEXUAL EXPLOITATION AND ABUSE

In August 2015 Amnesty International reported the rape of a 12 year old girl by a United Nations (UN) peacekeeper (in the UN Multidimensional Integrated Stabilization Mission in the Central African Republic).[1] Following these allegations, there were further reports of UN peacekeepers involved in the sexual abuse of several young women living in shelters in the Central African Republic.[2] Unfortunately, sexual exploitation and abuse by UN peacekeepers is not an isolated or recent problem but has been present in almost every peacekeeping operation. A culture of sexual exploitation and abuse is contrary to the UN's zero-tolerance policy and has been the subject of institutional reforms.[3] Despite this, allegations of sexual abuse continue to emerge. The system of accountability for acts of sexual exploitation and abuse is complicated by the many different categories of UN personnel, each with their own set of standards and disciplinary measures. In relation to military contingents, it is the troop-contributing country (TCC) that has exclusive jurisdiction to investigate, discipline or initiate criminal prosecution.

The current framework is insufficient to ensure accountability of peacekeeping personnel who commit sexual exploitation and abuse. Primary reasons for this gap include the total reliance on TCCs to enforce accountability and that victims of sexual exploitation and abuse

[1] Amnesty International "CAR: UN Troops implicated in rape of girl and indiscriminate killings must be investigated" (news release, 11 August 2015).
[2] T Esslemont "EXCLUSIVE – UN Peacekeepers face new sex allegations in Central African Republic" *Trust* (11 November 2015) www.trust.org.
[3] Such reforms will be discussed below in Chapter One.

cannot enforce their rights as individuals at the international level. Prosecution by troop-contributing countries rarely happen[4] or are not reported on.[5] Moreover, the UN is restricted by its international agreements with both the contributing state and the host state. As a result, justice is neither done nor seen to be done.

(1) THE PURPOSE OF THIS THESIS

The aim of this thesis is to examine various ways the United Nations can improve individual criminal accountability for sexual exploitation and abuse committed by its peacekeepers, focussing on a particular category of personnel; military contingent members. I am particularly interested in the perspective of victims, potential victims, and the host state communities when looking at these options. My focus is centred on individual criminal accountability and criminal justice. It has been argued that such an emphasis on criminal law and prosecution as "justice" and a solution to the harms being committed against (predominately) women neglects other concepts of "justice" that may exist.[6] Victims of sexual exploitation and abuse, for example, may not necessarily view the criminal prosecution of offenders as "justice", but rather attach "justice" to receiving restorative measures or remedies. Therefore, while this thesis focuses on individual criminal accountability, it does not do so as to exclude other measures that might be explored and utilised to address sexual exploitation and abuse by peacekeepers. However, in an attempt

[4] The UN Conduct and Discipline Unit (which records statistics relating to misconduct by peacekeeping personnel) does not publish which TCCs are involved in allegations or the outcome of investigations, however, world media reports some examples of prosecution by TCCs see for example Garces R O "Uruguay: Peacekeepers Accused of Sexual Abuse in Haiti Jailed" *Huffington Post* (11 September 2011) www.huffingtonpost.com; AFP "Pakistan UN peacekeeping role at risk after 3 punished in Haiti sexual abuse case" (14 March 2012) *The Express Tribune* www.tribune.com.pk.

[5] Acknowledged by the Secretary-General after the 2015 allegations in the Central African Republic were revealed, see "Ban addresses top peacekeeping officials amid allegations of sexual abuse by UN 'blue helmets'" (13 August 2015) *UN News Centre* www.un.org.

[6] See generally, E Bernstein "Militarized humanitarianism meets Carceral Feminism" (2010) 36 *SIGNS* 45.

to mitigate this limitation, this thesis considers restorative concepts and reparations in Chapter Nine.

Applying a feminist lens, I will be guided by three conceptual principles; justice being seen to be done, host state ownership, and UN leadership (discussed below). These principles are about legitimacy in responding to sexual exploitation and abuse, inclusivity of the host state and victims, and transparency for the international community. Overall, the purpose of this thesis is to make recommendations about the best steps the UN can take to improve individual criminal accountability, whilst complying with these three core underlying principles.

(2) Scope of the Thesis

The thesis draws on previous research, including academic, non-Governmental Organisation (NGO) and UN reports, which have all looked at ways to improve accountability of military contingent members. Military personnel will be the primary focus of this thesis. Not only are military personnel the most complex in regards to their legal status, they also make-up the majority of peacekeeping personnel contributed by member states.[7] As a result, a large number of sexual exploitation and abuse allegations are against members of military contingents.[8] Therefore, it is important to consider enforcement issues relevant to military forces.

[7] As at June 2015 there were over 100,000 military personnel out of a total number of 123,945 UN Peacekeepers on mission see United Nations Peacekeeping "Peacekeeping Fact sheet" (30 June 2015) <www.un.org>.

[8] In comparison to other categories of personnel, such as civilian, UN police, UN officials and experts on mission see the figures for the year 2014 via Report of the Secretary-General *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* GA A/69/779 (2015) at [19]. See also R Murphy *UN Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues in Practice* (Cambridge University Press, 2007) at 23.

It appears that the accepted position for academics and policy-makers is to make reference to "sexual exploitation and abuse" or "SEA" as one complete and conjoined concept.[9] For the purposes of this thesis, and for consistency, sexual exploitation and abuse will be used to refer to sexual conduct committed by UN Peacekeepers that would be categorised as "serious misconduct" under the relevant codes of conduct.[10] However, arguably "sexual exploitation and abuse" can encompass so many different forms of sexual conduct that it is inappropriate or too simplistic to lump them both into one phrase without first making certain distinctions. The Secretary-General's 2003 *Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abu*se (S-G Bulletin) makes an important distinction between "sexual exploitation" and "sexual abuse" giving them different definitions with different elements of conduct.[11] Therefore, Chapter Two will consider each term separately.

Chapter Two will explore "sexual exploitation" as conceptualised under the UN's zero-tolerance policy, however it is important to note outright that, for the purposes of this thesis, "sexual exploitation" will be defined and limited to "survival sex". Sexual exploitation, as defined by the UN, focuses on the differential power dynamics between peacekeepers and the local community, who are often dependent on aid or assistance. The definition of sexual exploitation itself was conceived in the early 2000s for investigations conducted by the

[9] Some examples include Annex I "Report of the Inter-Agency Standing Committee Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises" in *Report of the Office of Internal Oversight Services on the Investigation into Sexual Exploitation and Abuse by aid workers in West Africa* GA A/57/465 (2002); Secretary-General *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations* GA A/59/710 (2005) prepared by Prince Zeid Ra'ad Zeid Al-Hussein: [Zeid Report]; C Morris "Peacekeeping and the Sexual Exploitation of women and girls in Post-Conflict societies: A Serious Enigma" (2010) *Journal of International Peacekeeping* 184; A J Millar "Legal aspects of Stopping Sexual Exploitation and Abuse in UN Peacekeeping Operations" (2006) *Cornell International Law Journal* 71; M Ndulo "The United Nations Responses to the Sexual Exploitation by Peacekeepers During Peacekeeping Missions" (2009) 27 *Berkeley Journal of International Law* 127.

[10] United Nations Secretary-General's Bulletin *Special Measures for Protection from Sexual Exploitation and Sexual Abuse,* UN Secretariat SG ST/SGB/2003/13 (2003): [S-G Bulletin (2003)]; UN Conduct and Discipline Unit Ten Rules: Code of Personal Conduct for Blue Helmets <http://cdu.unlb.org>; UN Conduct and Discipline Unit We are United Nations Peacekeeping Personnel <http://cdu.unlb.org>.

[11] S-G Bulletin (2003), above n 10.

OIOS of allegations against peacekeepers and humanitarian aid workers in West African refugee camps.[12] Many of these allegations involved circumstances of survival sex; where sex was exchanged for assistance or aid which is already owed to the local population.[13] Arguably, survival sex was the targeted conduct of the OIOS definition which later became the definition of "sexual exploitation" in the S-G Bulletin.

The S-G Bulletin's definition has received criticism for being potentially broad enough to include some consensual sexual relationships between peacekeepers and local women.[14] In particular, feminist critiques[15] have drawn attention to the lack of women's agency represented in the UN's zero-tolerance policy generally, labelling sex as the problem rather than the context in which the exploitation occurs.[16] Such context in UN peacekeeping operations would include poverty and displacement of the local population thereby creating a situation of few economic opportunities, particularly for women,[17] and the performance of toxic masculinity associated with militaries (both peacekeeping troops and within the host

[12] Report of the Office of Internal Oversight Services on the Investigation into Sexual Exploitation and Abuse by aid workers in West Africa, above n 9, at 1 and Annex I "Report of the Inter-Agency Standing Committee Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises" at [8].

[13]See *The Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organisation Mission in the Democratic Republic of the Congo*, 5 January 2005, A/59/661 at [12]; Zeid Report, supra n 9, at [6].

[14] See generally Otto "Making Sense of Zero-Tolerance Policies in Peacekeeping Sexual Economies" in Muno and Stuchin (eds) *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish, New York, 2007); O Simic *Regulation of Sexual Conduct in UN Peacekeeping Operations* (Springer Berlin, Heidelberg, 2012).

[15] Explored further in Chapter Two, see also A Harrington *Politicisation of Sexual Violence: From Abolitionism to Peacekeeping* (Ashgate, Surrey, 2010); Jennings "Service, sex, and Security: Gendered Peacekeeping Economies in Liberia and the Democratic Republic of the Congo" (2014) 45 *Security Dialogue* 313; Jennings and Nikolic-Ristanovic *UN Peacekeeping Economies and Local Sex Industries: Connections and Implications* (MICROCON Research Working Paper 17, September 2009); Kolbe "'It's Not a Gift When it Comes with Price": A Qualitative Study of Transactional Sex between UN Peacekeepers and Haitian Citizens" (2015) 4 S*tability: International Journal of Security & Development* 1; Otto, above n 14; J McGill "Survival Sex in Peacekeeping Economies: Re-reading the Zero Tolerance Approach to Sexual Exploitation and Sexual Abuse in United Nations Peace Support Operations" (2014) 18 *Journal of International Peacekeeping* 1; Simic, above n 14.

[16] Kolbe, above n 15, at 20; Otto, above n 14, at 260-66.

[17] Patel and Tripodi "Peacekeepers, HIV and the Role of Masculinity in Military Behaviour" (2007) 14 *International Peacekeeping* 584 at 588; McGill, above n 15, at 6.

state).[18] By placing local women in a passive role and as inherently vulnerable, the UN's zero-tolerance policy risks supporting cultural and social discrimination against women and dismisses the different levels of agency that might be operating in sexual relationships between peacekeepers and local women.[19]

"Survival sex" may describe a spectrum of possible exchanges between peacekeepers and local people: from a starving young woman being forced to exchange sex for humanitarian aid or assistance which she is already owed (as a beneficiary of assistance) on one end,[20] to a local woman who independently approaches peacekeepers to exchange sex for money on the other.[21] Both circumstances, and the grey area between, are "sexual exploitation" under the S-G Bulletin. It is not the intention of this thesis to define where the line should be drawn as to what is acceptable behaviour and what is "exploitation". Instead, I will use the most simple and offensive form of survival sex – that of sex being exchanged for aid or assistance which is already owed to the local population – as the subject of discussion. This will include the scenario of a local woman waiting in line for aid and being forced by a peacekeeper to exchange sex for such aid.

I will not consider adult prostitution as sexual exploitation for the purposes of this thesis. There is no internationally agreed position on the so-called exploitative nature of sex work. Additionally, there are differing levels of legality across states; where in some states

[18] See Higate "Peacekeepers, Masculinities, and Sexual Exploitation" (2007) 10 *Men and Masculinities* 99; S Martin *Must Boys be Boys?: Ending Sexual Exploitation and Abuse in UN Peacekeeping Missions* (Refugees International, October 2005) at 5.
[19] This rhetoric has been particularly embraced in literature about human trafficking for the purposes of sexual exploitation see S Milivojevic and S Copic "Victims of Sex Trafficking: Gender, Myths, and Consequences" in S G Shohan, P Knepper and M Kett (eds) *International Handbook of Victimology* (Taylor and Francis, Hoboken, 2010); see also Puechguirbal "Peacekeeping" in Shepherd (ed) *Gender Matters: A Feminist Introduction to International Relations* (Taylor and Francis, Hoboken, 2014) at 255-256.
[20] See for example, Human Rights Watch *The Power These Men Have Over Us: Sexual Exploitation and Abuse by African Union Forces in Somalia* (September 2014) at 22.
[21] See for example, *The Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organisation Mission in the Democratic Republic of the Congo*, above n 13, at [18].

prostitution is legal and regulated, such as in New Zealand,[22] prostitution is illegal in others, such as Pakistan.[23] Moreover, prostitution *per se* has not been considered violence against women under the *Convention on the Elimination of All Forms of Discrimination against Women* or the related *Recommendation 19* (discussed more in Chapter Two).[24] Also, there is a notable gap in research regarding the circumstances of sex workers in peacekeeping economies. For these reasons, I have excluded soliciting sex from adult prostitutes from consideration within this thesis.

I will be limiting my discussion of "victims" to local women and children. Although it is acknowledged that men and gender minorities can and have been victims of sexual exploitation by peacekeepers, recorded allegations demonstrate that women and children are disproportionately affected.[25] Instead of "victims", the terms "victim-survivor" or "survivor" could also be used. According to some feminist scholars,[26] the language used in relation to such issues involving war-time or post-conflict sexual violence is important. A rhetoric that embraces women as vulnerable, helpless victims in need of protection can serve discrimination against women; keeping women tied to the notion of "femininity" as "vulnerability" undermines efforts to break negative social and cultural gender roles.[27] I have chosen to frame my thesis around the term "victim" because I have defined a clear scope of what that term means in the context of this research (see above).

[22] See Prostitution Reform Act 2003 (NZ).
[23] See The Punjab Suppression of Prostitution Ordinance 1961 (PK); Pakistan Penal Code 1860 (PK), section 377.
[24] *Convention on the Elimination of All Forms of Discrimination against Women* 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981); Committee on the Elimination of Discrimination against Women *General Recommendation 19* (11th Session, 1992).
[25] Zeid Report, above n 9, at [12]-[13]; although it is acknowledged that continued focus on "women and children" as victims of sexual abuse in the discourse ignores discussion about the sexual abuse of men and gender minorities (such as transgendered persons), of which there is a gap in the research.
[26] See below n 27.
[27] This rhetoric has been particularly embraced in literature about human trafficking for the purposes of sexual exploitation see Milivojevic and Copic, above n 19; see also Puechguirbal, above n 19, at 255-256.

When making reference to "children" I will be referring to those aged less than 18 years. Eighteen is the age of maturity set by the S-G Bulletin.[28] Moreover, 18 years is the age of maturity under the *Convention on the Rights of the Child*.[29] The UN supports its adoption of 18 years by making reference to the context of unequal power dynamics, the purported vulnerability of the local population and the seriousness of sexual exploitation and abuse allegations.[30] However, this position does ignore the fact that the age of maturity will differ between states and that the host state may classify those under the age of 18 as adults for the purposes of local custom and law.[31] It also erases the agency of young women to make decisions regarding their sexual relationships and their bodies. Nevertheless, 18 years is the age set by the S-G Bulletin which is the primary document detailing the substantive definitions of sexual abuse and sexual exploitation; therefore, for consistency, when I refer to "children," it is to those under the age of 18.

This thesis represents the law, policies, and academic discourse as at 1 December 2015.[32]

(3) The Conceptual Foundation of this Thesis

I aim to apply a feminist lens to the issues raised in this thesis. This lens is placed within the feminist theories of anti-essentialism and intersectionality.[33] Anti-essentialism rejects the notion that there is one universal women's voice; instead, this theory recognises the variety

[28] S-G Bulletin (2003), above n 10, at [3.2(b)].
[29] *Convention on the Rights of the Child* 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [CRC] art 1.
[30] *Report of the Office of Internal Oversight Services on the Investigation into Sexual Exploitation and Abuse by aid workers in West Africa*, above n 9, at [9].
[31] M Kanetake "Whose Zero Tolerance Counts? Reassessing the Zero Tolerance Policy against Sexual Exploitation and Abuse by UN Peacekeepers" (2010) 17 *International Peacekeeping* 200 at 201.
[32] Since this thesis was initially submitted, there have been two important developments – an Independent Review Panel Report (December 2015) and Security Council Resolution 2272 (March 2016). As a result of corrections, the Resolution will be referred to in certain parts of this thesis where relevant but without detailed analysis. Additionally, the Postscript (after Part Five) will give an overview of the Independent Review Panel Report in so far as it is relevant to the thesis.
[33] For an overview of feminist legal theories, particularly how they have been applied in international law see H Charlesworth and C Chinkin *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, Manchester, 2000) at 23-61.

of experiences between groups of women.[34] For example, law or policy which is based on the experiences of white, middle-class, heterosexual women will not necessarily be applicable to women of colour.[35] Ignoring historic social and cultural contexts and differences may support further discrimination against one group of women, while another may significantly benefit.[36] My feminist lens also attempts to reflect the intersectional nature of oppression.[37] Intersectionality recognises that oppression may not only be based on gender, but also class, race, and sexual orientation and these oppressions may be operating at the same time and be interrelated.[38] Overall, anti-essentialism and intersectionality focus on the context in which gender discrimination exists. This feminist lens favours bottom-up approaches to accountability centralising the views of victims of violence and their communities. Therefore, in addition to the feminist lens, there are three core principles that underlie my thesis; firstly, the theory of open justice – that justice should be seen to be done, secondly, host state ownership and thirdly, UN leadership. Ultimately, these principles are about legitimacy in responding to sexual exploitation and abuse, inclusivity of the host state and victims, and transparency to the international and local community.

In this thesis I am focussing on the United Nations' role in improving accountability, while also centralising the interests of victims, potential victims and host state communities when looking at options for greater accountability. Therefore, the three principles seek to guide

[34] Charlesworth and Chinkin, above n 33, at 44-46 and 52-56; see also discussion on essentialism and anti-essentialism by D L Brooks "A Commentary on the Essence of Anti-Essentialism in Feminist Legal Theory" (1994) 2 *Feminist Legal Studies* 115.
[35] For a critique of essentialism's impact on women of colour see A P Harri "Race and Essentialism in Feminist Legal Theory" (1990) 42 *Stanford Law Review* 581.
[36] Charlesworth and Chinkin, above n 33, at 44-46 and 52-56.
[37] See further K Crenshaw "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) *The University of Chicago Legal Forum* 139; K Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour" (1991) 43 *Stanford Law Review* 1241.
[38] See S N Hasse-Biber *Handbook of Feminist Research: Theory and Praxis* (2nd ed, SAGE, California, 2012) at 154ff; D Staunæ and D M Sondergaard "Intersectionality: A Theoretical Adjustment" in R Buikema, G Griffin and N Lykke *Theories and Methodologies in Postgraduate Feminist Research: Researching Differently* (Routledge, London, 2011) 45; Report of the Secretary-General *In-Depth Study of all forms of Violence against Women* GA A/61/122/Add.1 (2006) at 361.

assessment of alternative means of holding peacekeepers to account based on these viewpoints.

(A) JUSTICE SEEN TO BE DONE[39]

> "… it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

The rhetoric of "justice being seen to be done" is a crucial element of the principle of open justice; the public administration of justice.[40] This principle has its roots in the common law courts of England.[41] As such, Commonwealth countries and the United States have embraced the principle as a central element of the common law justice system.[42] "Open justice" is tied to the notions of democracy and accountability.[43] Court proceedings, particularly criminal cases, should be visible and open to the public; not only should the public see justice being done, but also how proceedings are delivered (a check and balance on the functioning and role of the judiciary), and to participate (jury or judgement by peers).[44] Although primarily a common law principle, the theory of open justice is now reinforced in international law under art 14(1) of the *International Covenant on Civil and Political Rights* (and thus is part of international standards):[45]

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[39] Proceeding quote from *Rex v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259.
[40] See generally C Baylis "Justice Done and Justice Seen to be Done – the Public Administration of Justice" (1991) 21 *Victoria University of Wellington Law Review* 177.
[41] For historical overview of the principle of open justice see generally G Nettheim "The Principle of Open Justice" (1984) *University of Tasmania Law Review* 25.
[42] Nettheim, above n 41, at 30-44.
[43] Baylis, above n 40, at 184.
[44] Baylis, above n 40, at 185-186 and 190-191; Hon J J Spigelman CJ "Seen to be Done: The Principle of Open Justice" (keynote address to the 31st Australian Legal Convention, Canberra, 9 October 1999) at 24-25 and 26-28.
[45] *International Covenant on Civil and Political Rights* 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law … any judgement rendered in a criminal case shall be made public.

For the purposes of this thesis, I will be focussing on the "justice being seen to be done" element of the open justice principle. Under the status quo the troop-contributing state has exclusive criminal jurisdiction where a military contingent member commits sexual exploitation and abuse; therefore, prosecution (if any) is likely to occur in a foreign country. Although troop-contributing states are required to report on outcomes of cases to the UN, such reports are inconsistent.[46] The United Nations is often in the dark in relation to cases, the host state rarely receives information, and the victim and their communities are also left without closure. Therefore, from the point of view of the international community, justice is currently not being seen to be done.

I am taking the reasonable members of the international community here as the interested "public" (which should see justice being done) under this principle. Sexual exploitation and abuse is committed by international personnel working within a United Nations mandate (the UN represents its member states – essential participants of the international community). It is within the interests of the international community that perpetrators be held accountable. "Justice being seen to be done" is about transparency, fairness and legitimacy. Therefore, when exploring the different avenues of improving accountability of

[46] *Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual)* GA A/c.5/66/8 (2011) ch. 9 Memorandum of Understanding [2007 MOU] art 7 *sexiens* (1). Report of the Secretary-General *Special Measures for the Protection from Sexual Exploitation and Abuse* GA A/67/766 (2013) at [15].

military contingent members who commit sexual exploitation and abuse, I will be assessing whether such options allow for or improve "justice being seen to be done".

(B) HOST STATE OWNERSHIP

In addition to improving the public administration of justice, response mechanisms should also foster host state ownership. In recent years, the UN has placed value in host state ownership and active participation of the local population in peacekeeping and peacebuilding.[47] According to the UN, the eventual success of peacekeeping operations requires the cooperation, support and general inclusivity of the local population to be prioritised.[48] It is not about outside contributors solving post-conflict situations, but about empowering local actors at all levels of society to exercise ownership towards sustainable peace.[49] Specifically, the active participation of women in peacekeeping and peacebuilding is an essential element for the success of modern missions.[50] Host state ownership is also part of the capacity building element of peacekeeping/peacebuilding operations and brings legitimacy to international projects implemented nationally.[51] There seems to be much

[47] Report of the Secretary-General *The Future of the United Nations Peace Operations: Implementation of the Recommendation of the High-Level Independent Panel on Peace Operations* GA A/70/375-S/2015/628 (2015) at [64]; *Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict* GA A/63/881-S/2009/304 (2009) at [7]-[14]; *Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict* GA A/64/866-S/2010/386 (2010) at [26]-[31]; *Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict* GA A/67/499-S/2012/746 (2012); *Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict* GA A/69/399-S/2014/694 (2014) at [27]-[39].

[48] *The Future of the United Nations Peace Operations: Implementation of the Recommendation of the High-Level Independent Panel on Peace Operations*, above n 47, at [64]; *Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict* (2010), above n 47, at [26].

[49] *Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict* (2010), above n 47, at [26]. See generally, E Newman, O Richmond and R Paris *New Perspectives on Liberal Peacebuilding* (United Nations University Press, New York, 2009).

[50] *Security Council Resolution 1325* SC Res S/Res/1325 (2000); *Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict* (2010), above n 47, at [32]-[32]; *Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict* (2012), above n 47, at [24]-[33].

[51] R Machold and T Donais *From Rhetoric to Practice: Operationalising National Ownership in Post-Conflict Peacebuilding* (Workshop Report, 2011) at 3.

debate about what national ownership means and its scope, which may differ between host states.[52]

Host state ownership as a concept is both crucial and broad. It has been argued that the broad conceptualisation of ownership is necessary for its practical application; each peacekeeping or peacebuilding mission is different and a flexible understanding of "ownership" can realise the capacity of various local communities or stakeholders.[53] Such ownership, for example, can be understood as "national ownership" (government, including opposition parties) and "local ownership" (residents of communities).[54] Additionally, there are many different ways in which ownership may be realised, for example, by including local stakeholders in decision making, government consultation, outreach to communities and information sharing.[55] In post-conflict settings not all of these methods of partnership may be practicable.[56] However, the concept of host state ownership, as implemented so far by the UN, has been criticised for prioritising liberal principles (such as human rights and democracy) over local and context specific knowledge and experience.[57] Advancing a "one size fits all" approach can undermine the legitimacy hoped to be achieved through host state ownership.[58] Notwithstanding this criticism, host state ownership is a UN strategic principle and crucial for sustainable peace after conflict.[59] Moreover, local ownership and participation can be

[52] At 2.
[53] Newman et al, above n 49, at 13-14.
[54] United nations Peacekeeping Operations and Department of Field Support *United Nations Peacekeeping Operations: Principles and Guidelines* (2008) at 38-39.
[55] A Hansen "Local Ownership in Peace Operations" in T Donais (ed) *Local Ownership and Security Sector Reform* (DCAF Yearly Books, 2008) at 43.
[56] See S Chesterman "Ownership in Theory and in Practice: Transfer of Authority in UN Statebuilding Operations" (2007) 1 *Journal of Intervention and Statebuilding* 3.
[57] See for example, O J Sending "Why Peacebuilders Fail to Secure Ownership and be Sensitive to Context" *Security in Practice* (NUPI Working Paper, 2009); S B K von Billerbeck "Local Ownership and UN Peacekeeping: Discourse Versus Operationalization" (2015) 21 *Global Governance* 299.
[58] Sending, above n 57, at 7.
[59] *United Nations Peacekeeping Operations: Principles and Guidelines*, above n 54, at 38-39.

essential for centralising the views of victims of sexual exploitation and abuse by peacekeepers in a legitimate way.

The UN's policy of host state ownership and the involvement and support of the local population should also be a factor when considering various ways to improve accountability of its peacekeepers. Sexual exploitation and abuse are committed against members of the local population, breaching the trust the communities place in international personnel and abusing the unequal power dynamics that exist. To legitimatise the UN's continued presence in the host state community after its peacekeepers have violated such trust then arguably there should be some form of national ownership over response mechanisms. Hence my second underlying principle against which to assess mechanisms for holding peacekeepers to account will be host state ownership.

(C) UN LEADERSHIP

For my third underlying principle I will be considering the perspective of the United Nations, essentially asking what the UN can do to improve accountability mechanisms in response to sexual exploitation and abuse committed by military contingent members. Therefore, the third principle is United Nations leadership.

The UN has the central role in any UN peacekeeping mission and it would follow that the organisation should take leadership in response mechanisms. Arguably, to legitimise the zero-tolerance policy against sexual exploitation and abuse the UN needs to take leadership in accountability where its own standards have been breached. Furthermore, the UN is a human rights promoter as specified by the UN Charter[60] and has an essential role in monitoring human rights through its particular organs. Being unable or unwilling to take

[60] *Charter of the United Nations* 1 UNTS XVI (24 October 1945). See also the United Nations Human Rights Initiative, available online <www.un.org>.

action when its peacekeepers have abused the people that the UN serve would be at the very least hypocritical.[61] Moreover, since the early 2000s, the UN has already demonstrated leadership in responding to sexual exploitation and abuse, for example, through preventative measures and reforms.[62] Such measures include a Security Council resolution authorising the Secretary-General to remove and replace entire contingents where there is a pattern of sexual exploitation and abuse, and generally calls the UN to take action and leadership in response to this issue.[63]

Therefore to maintain and support the integrity of the UN as a human rights promoter, and the legitimacy of its standards against sexual exploitation and abuse[64] the UN should take active steps in establishing or improving accountability mechanisms. Overall, the UN is best placed to fulfil its leadership role in the international community in improving accountability for sexual exploitation and abuse committed by its peacekeepers in a way that legitimate, transparent, and inclusive.

(4) Structure of the Thesis

Drawing on the arguments made by others,[65] suggestions for improving accountability may be categorised into three groups: firstly, UN enforcement against the troop-contributing

[61] Kofi Annan "Annex. B: Draft United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff or Related Personnel" in *Comprehensive review of the whole question of peacekeeping operations in all their aspects Letter dated 25 May 2006 from the Secretary-General to the President of the General Assembly* GA A/60/877 (2006) at [10]: "the Charter of the UN reaffirms in the preamble 'faith in fundamental HRs, in the dignity and worth of the human person, [and] in the equal rights of men and women.' In art 101(3) 'the paramount consideration in the employment of staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity.' UN and its staff have a particular duty of care to the people they serve."
[62] Zeid Report, above n 9; *Special Measures for the Protection from Sexual Exploitation and Abuse* (2013), above n 46, at 16; Ban Ki Moon *Special Measures for the Protection from Sexual Exploitation and Abuse* GA A/68/756 (2014).
[63] *Security Council Resolution 2272* SC Res S/Res/2272 (2016).
[64] Notwithstanding the feminist critique of the zero-tolerance policy discussed in Chapter Two.
[65] These include, for example, R Burke *Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current Status Quo and Responsibility under International Law* (Leiden, Brill, 2014); E F Defeis "UN Peacekeepers and Sexual Abuse and Exploitation: An end to Impunity" (2008) 7 *Washington University Global Studies Law Review* 186; A Harrington "Victims of Peace: Current Abuse Allegations against UN

country for failure to investigate or prosecute incidences of sexual exploitation and abuse committed by their nationals; Secondly, alternative mechanisms to investigate and prosecute military contingent members should be pursued; Thirdly, the right of victims to receive reparations and better assistance and support from the UN.

The thesis is structured as follows; Part One will examine the history of sexual exploitation and abuse by UN peacekeepers. The structural context of UN peacekeeping will be explored, including the current legal framework of immunity and the UN's zero-tolerance policy on sexual exploitation and abuse. This Part will also discuss the concepts of "sexual abuse" and "sexual exploitation" as defined by the United Nations.

Part Two will examine the first suggestion to improve accountability; sanctioning the troop-contributing countries for failing to investigate and prosecute their nationals. This Part will consider whether there are obligations on states to exercise criminal jurisdiction over acts of sexual exploitation and abuse. Obligations may be found in international agreements (such as the Memorandum of Understanding, between the UN and the TCCs) or international human rights law. This Part will explore whether coercive measures against noncompliant states such as economic sanctions, withdrawal of troops from missions and blacklisting

Peacekeepers and the role of the Law in Preventing them in the Future" (2005) 12 *ILSA Journal of International & Comparative Law* 125; T Innes "The Accountability of Peacekeeping Operations: A Focus on Allegations of Sexual Abuse" (2011) 1 *Warwick Student Law Review* 19; V Kent "Peacekeepers as Perpetrators of Abuse" 14 *African Security Review* 85; C Morris "Peacekeeping and the Sexual Exploitation of women and girls in Post-Conflict societies: A Serious Enigma" (2010) *Journal of International Peacekeeping* 184; M Ndulo "The United Nations Responses to the Sexual Exploitation by Peacekeepers During Peacekeeping Missions" (2009) 27 *Berkeley Journal of International Law* 127; M Odello "Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers" (2010) 15 *Journal of Conflict & Security Law* 347; M O'Brien "Sexual Exploitation and Beyond: Using the Rome Statute of the International Criminal Court to Prosecute UN Peacekeepers for Gender-based Crimes" (2011) 11 *International Criminal Law Review* 803; *Report of the Group of Legal Experts on Ensuring the Accountability of United Nations Staff and Experts on Mission with Respect to Criminal Acts Committed in Peacekeeping Operations* GA A/60/980 (2006); Zeid report, above n 9; G Simm "International Law as a Regulatory Framework for Sexual Crimes committed by Peacekeepers" (2011) *Journal of Conflict and Security Law* 473.

troop-contributing countries may be utilised as procedural tool. Non-coercive measures such as “naming and shaming” states will also be considered.

Alternative ways to prosecute offenders will be considered in Part Three; these alternatives will include host state jurisdiction and the International Criminal Court. These options will be framed as desirable yet ultimately unsatisfactory.

Part Four will consider a “hybrid” solution: the establishment of a special court for peacekeepers, and victim inclusivity and support. A special court for peacekeepers will be put forward as the most viable option for alternate prosecution. Part Four will also examine the position of victims under the UN’s zero-tolerance policy and victim participatory rights in criminal justice institutions. The status-quo for victims is quite unsatisfactory, therefore “transformative” reparations will be argued as the most appropriate response for victims of sexual exploitation and abuse.

I will conclude in Part Five. In addition, I will provide recommendations on the best way(s) to improve accountability and provide justice for victims of sexual exploitation and abuse.

CHAPTER ONE: HISTORY OF SEXUAL EXPLOITATION AND ABUSE IN PEACEKEEPING AND UN RESPONSES

INTRODUCTION

From its inception, United Nations Peacekeeping has been at the centre of post-conflict territories. Although originally conceived to assist states in peace and security without armed forces, UN peacekeeping has increasingly expanded its mandated support to include military contingents.[66] The scale and diversity of modern peacekeeping can present a number of challenges for the international community. Currently, UN resources are stretched to cover 16 unique UN missions across four continents.[67] Without a UN "standing army", these missions require significant contributions from member states (both financial and human).[68]

Peacekeeping is multi-dimensional. Peacekeeping operations will have different roles depending on the location and mandate of the mission. Some tasks include re-building, establishing legal and political stability, attending to humanitarian issues and distributing much needed aid.[69] Therefore, UN peacekeeping can be central to the recovery of a state. Peacekeepers also work in hostile environments and provide support and protection to poor, displaced and often desperate people.[70] In such sensitive surroundings, peacekeepers have to deal with the negative consequences of post-conflict, such as increased crime.

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[66] United Nations Peacekeeping "Field Support" (2015) <http://www.un.org >.
[67] United Nations Peacekeeping "Current Peacekeeping Operations" (2015) <http://www.un.org>.
[68] "Peacekeeping Fact Sheet" above n 7.
[69] United Nations Peacekeeping "Background Note: United Nations Peacekeeping" (2015) <http://www.un.org>.
[70] Department of Peacekeeping Operations and Department of Field Support *A New Partnership Agenda: Charting a new horizon for UN Peacekeeping* (July 2009) at ii.

Those that are most at risk during and immediately after armed conflict are women and children.[71] Peacekeepers are generally under a duty to ensure protection of such vulnerable persons.[72] Unfortunately, it has been the case that the protector has become the perpetrator. In recent years there have been incidences where peacekeepers have been associated with crime, for example, trafficking of women for prostitution in Bosnia and Herzegovina and Kosovo.[73] Most alarming has been the number of allegations of sexual exploitation and abuse.[74]

A culture of sexual exploitation in the context of UN peacekeeping is incredibly damaging to the immediate victims and their communities. Moreover, the credibility of the UN and its relationship with the host state may be brought into question.[75] Without mutual trust between the host state and the UN, the local community will be unwilling to let peacekeepers do their work.[76] Moreover, adverse behaviour such as sexual abuse brings the United Nations' reputation as human rights promoter into disrepute.[77] Such behaviour is especially abhorrent when it occurs in the context of armed conflicts where the local use of sexual violence as a weapon of war is prevalent, such as in the Democratic Republic of Congo (DRC).[78] The detrimental impact of sexual exploitation and abuse has been recognised by the UN which has initiated reforms to counter the problem, particularly as a result of the Zeid Report

[71] The UN has continually acknowledged this fact in various Security Council resolutions, for example *Security Council Resolution 1325* SC Res S/Res/1325 (2000) concerning women, peace and security; *Security Council Resolution 1674* SC Res S/Res/1674 (2006) concerning the protection of civilians in armed conflict.
[72] See above Security Council resolutions, also note United Nations Secretary-General's Bulletin *Observance by UN Forces of International Humanitarian Law* SG B ST/SGB/1993/3 (1993) at Section 7ff.
[73] O Simic "'Boys will be boys'": Human Trafficking and UN Peacekeeping in Bosnia and Kosovo" in L Holmes (ed) *Trafficking and Human Rights: European and Asia-Pacific Perspectives* (Edward Elgar, Cheltenham, 2010) at 81-85.
[74] For example, between 2010 and 2015 there have been 398 allegations of sexual exploitation and abuse made against peacekeeping personnel, see UN Conduct and Discipline Unit "Allegations for All Categories of Personnel Per Year (Sexual Exploitation and Abuse)" (30 November 2015) <www.un.org>.
[75] Morris, above n 65, at 186.
[76] S Ghosh "Are UN Peacekeepers Doing More Harm than Good?" *Aljazeera* (15 August 2015) http://www.aljazeera.com via interviewee Christos Tsatsoulis.
[77] Morris, above n 65, at 186.
[78] See for example "DR Congo mass rape in Fizi: 170 attacked" (24 June 2011) *UN News Centre* <http://www.bbc.co.uk> where DRC was described as the "rape capital of the world".

published in 2005.[79] However, despite the raft of seemingly positive reforms, allegations of sexual exploitation by UN peacekeepers continue to emerge resulting in yet another official probing into the issue in 2015.[80]

(1) Extent of Sexual Exploitation and Abuse in Peacekeeping Operations

In 2007 a 12 year old girl, "Elizabeth", was walking home from school on a solitary road in Côte d'Ivoire.[81] She was alone when a United Nations peacekeeping truck pulled up alongside her, and she was then raped by ten peacekeeping soldiers on the side of that road. A year later when her story was reported by world media, she was psychologically traumatised and afraid to leave her home. None of her attackers were ever identified or punished.

In a Human Rights Watch report, sexual exploitation by African Union Peacekeepers was revealed as systemic in Somalia.[82] In one case, a 19 year old Somali woman was brought to base camp for the purposes of sex.[83] Although she was afraid, she was displaced, poor and hungry.[84] She was paid ten dollars each time she visited the base for sex.[85]

In April 2015 a report leaked by an NGO[86] and reported by world media revealed that French peacekeepers in the Central African Republic had forced local children (eight-13 year olds)

[79] See above n 65.
[80] G Russell "EXLCUSIVE: UN sex abuse scandal: Secretary General Ban Ki-Moon announces new inquiry" *Fox News* (4 June 2015) http://www.foxnews.com.
[81] The following story comes from M Pflanz "Six-year-olds Sexually Abused by UN Peacekeepers" *The Daily Telegraph* (26 May 2008) http://www.telegraph.co.uk/news ("Elizabeth" is a pseudonym).
[82] Human Rights Watch, above n 20.
[83] At 22.
[84] At 22.
[85] At 22.
[86] AIDS-Free World.

to perform oral sex in exchange for food.[87] Prompted by the leaked report,[88] it still took over a year before France launched its investigations into the allegations. In fact, the initial "whisteblower" on the sexual exploitation was disciplined by the United Nations.[89]

Allegations of sexual exploitation and abuse by peacekeeping personnel first caught media attention during the 1990s. Reports of such conduct had been documented in Cambodia, Liberia, Sierra Leone, and Somalia.[90] In 2001, the UN Refugee Agency (UNHCR) and Save the Children[91] identified cases of sexual exploitation in West African refugee camps.[92] A subsequent report of the Office of Internal Oversight Services (OIOS)[93] revealed allegations against UN personnel (both civilian and military) and NGO employees. These cases involved a range of conduct, such as soliciting sex from prostitutes, rape and sexual relationships based upon the dependency of beneficiaries.[94] Women and children were the majority of identified victims.[95]

Although the report conceded that the particular situation of the refugees invited sexual abuse, OIOS could not substantiate the claim that sexual exploitation was "widespread".[96] Furthermore, soliciting sex from adult prostitutes was distinguished from sexual relationships "involving persons in power or authority taking advantage of female

[87] The following story comes from K Willsher and S Laville "France Launches Criminal Inquiry into Alleged Sex Abuse by Peacekeepers" *The Guardian* (7 May 2015) http://www.theguardian.com/world.
[88] Dr T Awori, Dr C Lutz and General P J Thapa *Final Report: Expert Mission to Evaluate Risks to SEA Prevention Efforts in MINUSTAH, UNMIL, MONUSCO, and UNMISS* (2013) leaked by AIDS-Free World March 2015 see AIDS-Free World *Open Letter to Ambassadors of All United Nations Member States* (16 March 2015) <www.aidsfreeworld.org>.
[89] The whistleblower was vindicated months later see Colum Lynch "The UN Official Who Blew the Lid off Central African Republic Sex Scandal Vindicated" (17 December 2015) *Foreign Policy* <www.foreignpolicy.com>.
[90] Simm, above n 65, at 473-474.
[91] UK based NGO.
[92] See for example, UNHCR and Save The Children-UK *Sexual Violence and Exploitation: The Experience of Refugee Children in Guinea, Liberia and Sierra Leone* (February 2002).
[93] *Investigation into sexual exploitation of refugees by aid workers in West Africa*, above n 9.
[94] At [17]-[21].
[95] At [17]-[21].
[96] At [42].

refugees"[97]; according to OIOS only the latter was sexual exploitation. Notwithstanding these remarks, several recommendations were made in order to prevent future cases of sexual exploitation and abuse, such as uniform codes of conduct and guidelines for reporting and investigating allegations.[98]

The United Nations Organisation Mission in the Democratic Republic of Congo (MONUC)[99] was next under the media spotlight for allegations of sexual exploitation and abuse in 2004.[100] The reports were similar to those documented in West Africa in 2001. They included prostitution, exchanges of sex for food, paedophilia, sexual violence and rape.[101] Again, allegations involved UN and NGO personnel against women and children (under the age of 18 years).[102] The gravity and extent of the abuse alleged provoked a high-level response from UN officials.[103] Now UN High Commissioner for Human Rights, Prince Zeid Ra'ad Al-Hussein, then Personal Adviser to the UN Secretary-General, issued a report on the extent of sexual exploitation and abuse in the context of peacekeeping.[104] Contrary to the findings of the OIOS, the Zeid Report confirmed a culture of sexual exploitation.[105] In addition, the Zeid Report highlighted the "exploitative nature" of adult prostitution in peacekeeping and described such conduct as a "breach of trust".[106]

In order to measure the extent of the problem of sexual exploitation and abuse currently, one may look at statistics provided by the UN's Conduct and Discipline Unit (CDU). Although

[97] At [43].
[98] At [55].
[99] Renamed United Nations Organisation Stabilisation Mission in the Democratic Republic of Congo (MONUSCO) see *Security Council Resolution 1925* SC Res S/Res/1925 (2010).
[100] Odello, above n 65, at 350.
[101] General Assembly *Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nation Organisation Mission in the Democratic Republic of Congo* GA A/59/661 (2005) at [10]-[11].
[102] Above n 44.
[103] E F Defeis "UN Peacekeepers and Sexual Abuse and Exploitation: An end to Impunity" (2008) 7 *Washington University Global Studies Law Review* 186 at 187.
[104] Zeid Report, above n 9.
[105] At 7-8.
[106] At 8.

it has been noted by CDU that the number of allegations has decreased every year since 2009,[107] reports of sexual exploitation and abuse continue to emerge with 82 allegations recorded between 2014 and 2015. Moreover, official statistics do not reflect the issue of under-reporting, particularly by child victims.[108] More recent examples of sexual exploitation and abuse are noted above. Other examples have occurred in the context of the UN Stabilisation Mission in Haiti (MINUSTAH).[109] In 2011, there was a reported case involving sexual exploitation of children by a small group of Uruguayan peacekeepers[110] and in 2012 a number of Pakistani peacekeepers were repatriated following sexual abuse of an underage Haitian male.[111] Additionally, the recent (2015) allegations involving peacekeepers in the Central African Republic prompted another review of UN response mechanisms.[112]

What may be concluded from the above discussion is that sexual exploitation and abuse is not confined to any particular mission. Moreover, it appears that offenders are not from any particular national contingent. Arguably, this points to a culture of sexual exploitation and abuse in UN peacekeeping operations. It is also clear that before 2004 sexual exploitation and abuse by peacekeepers was not treated as a serious problem arguably highlighting a "boys will be boys" attitude of UN officials.[113] The Zeid Report signified a change in approach and brought to attention the lack of implementation of the UN's zero-tolerance

[107] UN Conduct and Discipline Unit "Allegations for All Categories of Personnel Per Year (Sexual Exploitation and Abuse)" (31 July 2015) <http://cdu.unlb.org>.
[108] See Save the Children-UK *No one to turn to: the under reporting of child sexual exploitation and abuse by aid workers and peacekeepers* (Save the Children Fund, London, 2008).
[109] *Security Council Resolution 1542* SC Res S/Res/1542 (2004).
[110] "Senior UN Team heads to Haiti in wake of Alleged Abuse by Peacekeepers" *UN News Centre* (14 September 2011) http://www.un.org.
[111]"Haiti: UN opens probe into cases of alleged child sexual exploitation" *UN News Centre* (23 January 2012) http://www.un.org.
[112] "Panel to Review UN Reponses to Alleged Central African Republic Sex Abuse" *The Guardian* (22 June 2015); Secretary General Ban Ki-moon *Statement attributable to the Spokesman for the Secretary-General on the appointment of a Panel on the External Independent Review of the United Nations Response to Allegations of Sexual Exploitation and Abuse and Other Serious Crimes by Members of Foreign Military Forces not under United Nations Command in the Central African Republic* (22 June 2015).
[113] Harrington, above n 65, at 126.

policy. However, recent reports during 2014 and 2015 indicate the zero-tolerance policy is not being adhered to and that current reforms have not been enough to overcome the culture of sexual exploitation.

(2) The United Nations' Zero-Tolerance Policy

The United Nations' policy is a prohibitionist approach on sexual exploitation and abuse, including soliciting sex from local adult prostitutes. Currently, any form of sexual exploitation and abuse is defined as "serious misconduct" under two UN codes of conduct[114] and the Secretary-General's 2003 *Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse.*[115] Peacekeeping personnel are forbidden from buying sex from prostitutes or engaging in sexual conduct with persons under the age of 18 years.[116] Furthermore, sexual relationships between peacekeepers and beneficiaries are "strongly discouraged".[117]

Coupled with the general prohibition, a number of institutional reforms of a preventative nature were initiated post-2005. These include reforms that seek to regulate the behaviour of troops; for example, the instalment of recreation facilities within the mission site, out-of-bounds areas and curfews.[118] Additionally, there has been the introduction of "gender mainstreaming"; which in this context means encouraging more women to take on peacekeeping roles. Gender mainstreaming was originally envisioned by the Zeid Report to have a positive influence on the behaviour of male personnel in relation to discouraging

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[114] *Ten Rules: Code of Personal Conduct for Blue Helmets,* above n 10 and *We are United Nations Peacekeeping Personnel*, above n 10.
[115] S-G Bulletin (2003), above n 10.
[116] At [3.3(b)]-[3.3(c)].
[117] At [3.3(d)].
[118] Z Deen-Racsmary "The Amended UN Model Memorandum of Understanding: A New Incentive for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents?" (2011) 16 *Journal of Conflict and Security Law* 321 at 333.

sexual exploitation and abuse.[119] However, the percentage of women in peacekeeping remains low;[120] therefore it is difficult to assess the extent to which increased female participation within peacekeeping has an effect on their male counterparts.[121] Other reforms have focussed on improved education and training of peacekeeping personnel before they go on mission.[122]

Conduct and Discipline Teams are set up in the field to raise local awareness of sexual exploitation and abuse and reporting mechanisms.[123] Troops, particularly national commanders, are given detailed training in the zero-tolerance policy in both pre-deployment and in mission.[124] Policy-makers such as the Inter-Agency Standing Committee continue to look at ways to improve education and prevention of sexual exploitation and abuse.[125] However, a 2015 report by the Office of Internal Oversight Services indicated that local awareness of sexual exploitation and the UN's zero-tolerance policy remains low to non-existent and that there is still confusion among personnel about what constitutes "sexual exploitation".[126]

Reforms regarding assistance and support to victims have been slow to be implemented. Although the *United Nations Comprehensive Strategy on Assistance and Support to Victims*

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[119] Zeid Report, above n 9, at 18-19.
[120] For example, in 2010 only 3.33% of police and military contingent members identified as female; see Department of Peacekeeping Operations and Office of Military Affairs *Statistical Report on Female Military and Police Personnel in UN Peacekeeping Operations Prepared for the 10th Anniversary of the SCR 1325* (2010). There is no official information about the percentage of UN personnel who identify as transgender or otherwise gender-variant.
[121] See generally O Simic "Does the Presence of Women really matter? Towards Combating Male Sexual Violence in Peacekeeping Operations" (2010) 17 *International Peacekeeping* 188.
[122] Secretary-General *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* GA A/65/742 (2011) at [20], [31] and [34].
[123] Odello, above n 65, at 355.
[124] For a list of training materials see the Protection from Sexual Exploitation and Abuse Task Force website: www.pseataskforce.org.
[125] See for example, Inter-Agency Standing Committee *Global Review of Protection from Sexual Exploitation and abuse by UN, NGO and IFRC Personnel* (July 2010).
[126] See Office of Internal Oversight Services *Evaluation Report: Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations* (May 2015) at [47] and [55].

of Sexual Exploitation and Abuse by UN Staff and Related Personnel has been in its first stages of implementation since 2009,[127] the latest report from the Secretary-General indicates a failure to transfer the strategy into practice.[128] Chapter Nine of this thesis will consider UN reforms in relation to victim assistance further.

So far, UN reforms have focussed primarily on policy and preventative measures. Arguably, in order to implement the zero-tolerance effectively and uphold the rule of law in the eyes of the host state, it is important to ensure actual accountability of abusers.[129]

(3) ACCOUNTABILITY

Under the zero-tolerance policy, if a peacekeeper engages in activity that falls within "sexual exploitation and abuse" under the S-G Bulletin it is expected that disciplinary measures will be taken.[130] There are up to five different categories of peacekeeping personnel, each with different levels of legal immunities which can complicate individual accountability.[131] Due to the unpredictable and hostile environment in which peacekeepers operate, immunities offer important protection from the host state.[132] However, they are not intended to benefit the particular individual.[133] Article 105 of the UN Charter and the *Convention on the Privileges and Immunities of the United Nations*[134] provide functional immunities to UN officials, civilian staff, and experts on mission. Essentially, these categories of UN personnel

[127] General Assembly *United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel* GA Res A/RES/62/214 (2008).
[128] *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* (2015), above n 8, at [65].
[129] Harrington, above n 65, at 147.
[130] See generally S-G Bulletin (2003), above n 10.
[131] These include, UN Volunteers, Individual contractors, Civilian Police, Military Observers, and Military Contingents see Odello, above n 65, at 365.
[132] F Rawski "To Waive or not to Waive: Immunity and Accountability in UN Peacekeeping Operations" (2002-2003) 18 Conn J Int'l L 103 at 104.
[133] At 106.
[134] *Convention on the Privileges and Immunities of the United Nations* 1 UNTS 15 (opened for signature13 February 1946, entered into force 17 September 1946); Other relevant Treaties include *Convention on the Privileges and Immunities of Specialised Agencies* 33 UNTS 261 (opened for signature 21 November 1947, entered into force 2 December 1948); *Convention the Safety of the United Nations and Associated Personnel* 2051 UNTS 363 (opened for signature 9 December 1994, entered into force 15 January 1999).

are immune from criminal proceedings by the host state "in respect of all words spoken or written or acts done by them in the course of the performance of their mission".[135] This "functional immunity" may be waived by the Secretary-General and does not cover any act which is outside the scope of official duties.[136] It is generally accepted that sexual exploitation and abuse will unlikely fall within the scope of "official duties".[137] Consequentially, in certain circumstances, UN officials, civilian staff, and experts on mission may face disciplinary action through the UN, and face the possibility of criminal prosecution in the host state or their contributing state. Military contingents are not included under the Convention but have their own set of privileges and immunities under two bilateral agreements: the Status-of-Forces-Agreement (SOFA) and Memorandum of Understanding (MOU).

The legal status of military contingents derives from a variety of sources; these can include the domestic laws of both the host state and the troop-contributing country, the administrative law of the UN and applicable norms of international law.[138] There are also several international agreements and legal documents that apply; those of particular relevance include Status-of-Forces-Agreements and Memorandums of Understanding. The SOFA is an agreement between the UN and the host state stipulating privileges and immunities attributable to peacekeeping troops whilst on mission. According to the Model-SOFA,[139] although military personnel must respect local laws and customs, they are immune from host state jurisdiction. Moreover, unlike other categories of personnel, members of the

[135] *Convention on the Privileges and Immunities of the United* Nations, at arts V (22) and V(18).
[136] Rawski, above n 132, at 111.
[137] See generally Rwaski, above n 132.
[138] B Kondoch "The Responsibility of Peacekeepers, their Sending States and International Organisations" in T D Gill and D Fleck (eds) *The Handbook of International Law of Military Operations* (Oxford University Press, 2010) at 519.
[139] *Model Status of Forces Agreement between the United Nations and Host Countries* GA A/45/594 (1990) [SOFA] at [47(a)].

military are subject to the exclusive jurisdiction of the troop-contributing country.[140] This is reiterated in the Memorandum of Understanding,[141] the agreement between the UN and the TCC. Under the Model-MOU the contributing country assures the UN that they will exercise its criminal jurisdiction in respect to offending.[142] Issues such as to what extent these documents are legally binding on the TCC will be discussed in Chapter Three. Nevertheless, together the SOFA and MOU provide immunities that prevent the host state from prosecuting the offender. Moreover, for military contingent members, it would appear that accountability is entirely dependent on the contributing state.

The UN has initiated some reforms in relation to individual accountability, although none challenge the exclusive criminal jurisdiction of troop-contributing countries. Under UN policies, sexual exploitation and abuse are described as "category one" allegations; these are generally dealt with by OIOS, the investigative arm of the UN.[143] However, in the case of military contingents such investigations remain the primary responsibility of the contributing country.[144] Under the current structure, if a TCC fails to respond to a complaint of sexual exploitation and abuse within ten days, a preliminary fact-finding inquiry is undertaken by the UN.[145] The investigation is then transferred to the national government concerned for formal investigation.[146] Since May 2015, the UN has requested that states complete their investigations within a six-month timeline, with no additional mechanism to enforce TCCs to comply.[147] At most, the UN may repatriate the individual where a case is

[140] At [47(b)].
[141] 2007 MOU, above n 46.
[142] 2007 MOU, above n 46, art 7 *quinquiens.*
[143] Odello, above n 65, at 336.
[144] 2007 MOU, above n 46, art 7 *sexiens (i).*
[145] Currently through the OIOS see 2007 MOU, above n 84, art 7 *quarter* (2). The UN has indicated that this task will soon be taking over by newly created "Immediate Response Teams", "Fact Sheet on Sexual Exploitation and Abuse" above n 7: See also 2007 MOU, above n 46, Annex F at [33]: "preliminary fact-finding inquiry" refers to the preservation of evidence including the collection of written statements, but does not refer to interviewing witnesses as this is the responsibility of the TCC's investigation.
[146] See 2007 MOU, above n 46, art 7 *quarter* (3) and (4).
[147] "Fact Sheet on Sexual Exploitation and Abuse", above n 7.

substantiated.[148] Further enforcement measures, such as prosecution, will be determined by the contributing state.

Although the Model-MOU was amended in 2007 to incorporate the UN codes of conduct, accountability of military contingents is still dependant on whether the TCC chooses to take appropriate action against the individual.[149] The role of the UN is restricted by the terms of the SOFA.[150] As the law currently stands, the exclusive jurisdiction of the troop-contributing country has resulted in an accountability gap, and this gap appears within the system in place to respond to sexual exploitation and abuse (responsive framework).

The UN expects the troop-contributing country to report on disciplinary outcomes where a soldier has been repatriated home. Historically, such reporting has been notably poor; for example, in 2010 out of 74 requests for follow-up reports, there were only 29 responses from member states.[151] Although reporting has improved in recent years, with 93 state responses out of 100 UN requests in 2015, there is no way to know what information has been requested from which states or what information states provide in their reports.[152] As a result, forming a picture of typical TCC responses to repatriated troops is near impossible. This is exemplified by the *UN Action to Counter Misconduct Factsheet* issued by CDU.[153] Out of 40 substantiated cases of sexual exploitation and abuse in 2010, the factsheet lists only seven incidents where further action was taken against military personnel by the member state. There are many procedural, practical and evidential requirements that may hinder prosecution in the home state. Nevertheless, it appears that contributing countries are either

[148] Odello, above n 65, at 382.
[149] MOU, above n 46, at art 7 *quinquiens* (1).
[150] Morris, above n 65, at 209.
[151] UN Conduct and Discipline Unit "UN Follow-up with Member States (Sexual Exploitation and Abuse)" (30 June 2015) <https://cdu.unlb.org>.
[152] A general lack of reporting on outcomes was also reported by the OIOS in its 2015 report see *Evaluation Report: Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations*, above n 126, at [38].
[153] UN Conduct and Discipline Unit *Action to Counter Misconduct Factsheet*, available <http://cdu.unlb.org>.

refusing (or unable) to prosecute or discipline offenders for sexual exploitation and abuse or are not reporting their actions (if any) to the UN.

(4) UN ENFORCEMENT

In regards to filling the apparent "gap" in the current responsive framework, I argue that the focus should be on the United Nations to take action against perpetrators of sexual exploitation and abuse, in cooperation with both the TCC and host states. There are both general and legal reasons which justify a focus on UN leadership. For the general reasons, the most obvious is that military contingents are identified as "UN" peacekeepers. Their distinctive headgear has earned them the nickname "blue helmets" or "blue beret". Consequently, the local population will recognise the "blue helmets" as the UN; they represent the international community. Furthermore, the zero-tolerance policy is a UN standard and it is the only standard that applies. Therefore, it is arguable that the UN should retain responsibility to see that its standards are enforced.

Legal arguments could be made on the basis of the complex control and command structure of peacekeeping operations.[154] Peacekeeping missions are generally considered a subsidiary organ of the UN and often operate under a Security Council mandate.[155] Although contributing states may have an interest in the mission, they do not strictly set the parameters of the mission itself.[156] Although national commanders of military contingents maintain direct contact with the contributing state they are under an obligation to follow the instructions of the UN Force Commander.[157] It follows that as peacekeeping operations often

[154] The following is a generalised impression of command and control structures, for more a more detailed insight see Murphy, above n 65.
[155] At 220.
[156] At 220.
[157] There are certain elements to peacekeeping that undermine this argument. Such as the fact that military members are not completely seconded to the UN, they remain agents of their contributing state and that the national commanders retain the disciplinary jurisdiction see R Burke "Attribution of Responsibility: Sexual

start and end with the UN, then the UN should bear some responsibility in regards to accountability of its troops.

The UN should take more of an active step to improve accountability of members of military contingents, but what form should such accountability mechanisms take? An international organisation (IO), unlike a state, does not typically have the capacity to enforce criminal jurisdiction over individual actors.[158] Examples of measures that may be taken by an IO may include judicial, diplomatic, or political measures, or sanctions.[159] In regards to exercising such enforcement, international organisations are restricted by the particular powers attributed to them by their member states and defined in their constituent treaty.[160] Therefore, the measures which the UN can take against states or individual peacekeepers will be restricted by the UN Charter[161] and the particular agreements made between the UN and member states.

(5) Filling the Gap in the Responsive Framework: Previous Research

The gap in the current system of accountability has been picked up in both academic discourse and in official (and leaked) UN reports. The following section briefly describes the major contributions to the discussion on filling the gap in the responsive framework. The

Abuse and Exploitation, and Effective Control of Blue Helmets" (2012) 16 *Journal of International Peacekeeping* 1.

[158] L Tabassi "Introduction and Summary" in R Yepes-Enriquez and L Tabassi (eds) *Treaty Enforcement and International Cooperation in Criminal Matters: with Special Reference to the Chemical Weapons Convention* (TMC Asser Press, The Hague, 2002) at 9.

[159] P Sands and P Klein *Bowett's Law of International Institutions* (6th ed, Thomson Reuters, London, 2009) at 329.

[160] M M Martinez *National Sovereignty and International Organisations* (Kluwer Law International, Boston, 1996) at 70.

[161] In particular note UN Charter Art 2(7) which provides that "nothing contained in the Charter shall authorise the UN to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matter to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII".

primary focus of the discussion to date has been on increasing the role of the UN itself in relation to the enforcement of its zero-tolerance policy.

(A) UN INITIATIVES

There are a number of UN reviews that have explored the issue of accountability in peacekeeping. The first is the most influential and widely quoted; the Zeid Report. As noted above, this report has proven significant in improving the implementation of the UN's zero-tolerance policy. However, it should be noted that not all of Prince Zeid's recommendations have been introduced. In regards to filling the gap in the responsive framework, the report outlined a number of suggested reforms that involve the central role of the UN.

Following the Zeid Report, in 2005 a Group of Legal Experts was arranged to investigate and make suggestions regarding the criminal accountability of UN staff and experts on mission.[162] The subsequent recommendations of the Group have been the subject of on-going debates in the General Assembly, in particular the suggested *Convention on the Criminal Accountability of United Nations officials and experts on mission*.[163] Although the focus of the report was on non-military personnel, the Group of Legal Experts did look at sexual exploitation and abuse specifically and ways in which the UN could ensure criminal prosecution.

Recent 2015 reports have re-ignited calls for improving the responsive mechanism for sexual exploitation and abuse committed by peacekeepers. The first was leaked by an NGO and highlighted the failure of previous UN reforms to fill the accountability gap.[164] The second report was the OIOS *Evaluation Report*[165] which also emphasised the need to take another

[162] *Report of the Group of Legal Experts on Ensuring the Accountability of United Nations Staff and Experts on Mission with Respect to Criminal Acts Committed in Peacekeeping Operations* GA A/60/980 (2006).
[163] Above n 162, at Annex III.
[164] See above n 88.
[165] Above n 126.

look at reforming the current responsive framework including enforcement and remedies for victims.

(B) ACADEMIC CRITIQUE

There is general consensus amongst scholars that the current framework for accountability, ie the complete reliance on troop-contributing countries to exercise jurisdiction over military contingents, is flawed. For instance, Marco Odello[166] argues that the lack of prosecutions derives from the lack of certainty as to state obligations to investigate and prosecute for sexual exploitation and abuse. Other commentators, such as Alexander Harrington,[167] have also noted this ambiguity, suggesting that perhaps the UN should take more robust steps to enforce its standards. Elizabeth Defeis[168] goes further to suggest that the UN's failure to sanction for the lack of prosecutions has contributed to the gap in the responsive framework. Additionally, others, such as Gabrielle Simm,[169] have concluded that the current framework makes it difficult or impossible for individual victims to raise claims for adequate remedies at the international level.

Consequently, the above commentators and others[170] have suggested particular ways in which the UN may develop enforcement jurisdiction. These suggestions may be grouped into three categories which form the focus of this thesis. Firstly, UN enforcement against the troop-contributing country for failure to investigate or prosecute incidences of sexual exploitation and abuse committed by their nationals. Secondly, alternative mechanisms to

[166] Odello, above n 65.
[167] Harrington, above n 65.
[168] Defeis, above n 65.
[169] Simm, above n 65.
[170] For example, Burke *Sexual Exploitation and Abuse by UN Military Contingents*, above n 65; R Burke "UN Military Peacekeeper Complicity in Sexual Abuse: The ICC or a Tri-Hybrid Court" in M Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic EPublisher, Beijing, 2012); Deen-Racsmary above n 118; Innes, above n 65; Kent, above n 65; Morris, above n 65; Ndulo, above n 65; O'Brien, above n 65.

investigate and prosecute military contingent members should be pursued. Thirdly, the need for victims to receive reparations and better assistance and support from the UN. With some exceptions,[171] the majority of these suggestions have been made without any further investigation as to their legal foundation or their implications for victims and their communities.

Rather than being proactive, UN reforms thus far have been influenced by key events, particularly major media coverage of sexual exploitation and abuse, for example, widespread media reports of allegations in the DRC in 2004 which prompted the Zeid Report. Waiting for such "prompts" before taking action and merely tinkering with the current responsive framework has not solved the accountability problem. This thesis will ultimately advocate for a "hybrid" solution; a special court for peacekeepers.

My approach in this thesis differs from the above academics in two significant ways; firstly, I will place less reliance on the troop-contributing country, instead I am looking at the role of the UN. Commentators so far have favoured the exclusive criminal jurisdiction of TCCs and an alternative perspective has not been considered in depth when approaching ways to improve accountability. Secondly, taking a feminist lens, I am interested in the perspective of victims and their communities. Victims are not often centralised in current UN policies related to sexual exploitation and abuse or literature exploring options for improving response mechanisms.[172] Instead, the perspectives and interests of the UN and TCCs are centralised. Thus, I will use three conceptual principles to guide my inquiry in an attempt to

[171] For example, Burke *Sexual Exploitation and Abuse by UN Military Contingents,* above n 65; C E Sweetser "Providing Effective Remedies to Victims of Abuse by Peacekeeping Personnel" (2008) *New York University Law Review* 1643 (concerning financial compensation for sexual exploitation and abuse).
[172] See the exception of Olivera Simic's valuable research in Bosnia which will be discussed at length below in Chapter Two; Simic, above n 14.

centralise victims' interests; these principles are justice being seen to be done, host state ownership, and UN leadership (discussed above).

CHAPTER TWO: CONCEPTS - WHAT IS SEXUAL ABUSE AND SEXUAL EXPLOITATION?

INTRODUCTION

Essentially, the underlying rationale behind the zero-tolerance policy is the purported power imbalance between UN peacekeepers and the local population. It has been argued by UN officials and academics alike[1] that peacekeepers hold a position of trust in the host state community. Often operating in situations of post-conflict or natural disaster, UN peacekeepers are there to support the local population in various ways, including offering humanitarian, legal and similar assistance.[2] Not only can the local population be dependent on these services, but they can also be vulnerable to exploitation based on this dependency.[3] Therefore, it is the unequal power dynamics that can arguably lead to sexual exploitation and abuse of local women and girls. Consequently, such deferential power is an important element of the S-G Bulletin's definitions, particularly "sexual exploitation".

As the UN supports a zero-tolerance policy it is arguable that the context of UN peacekeeping itself automatically colours any sexual relationship between personnel and members of the local population as "exploitative". However, notwithstanding this possible inference, the prohibition is not a blanket rule against sexual relationships.[4] It has been noted

[1] For example *Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organisation Mission in the Democratic Republic of the Congo* GA A/59/661 (2005) at [23]; Secretary-General *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations* GA A/59/710 (2005) prepared by Prince Zeid Ra'ad Zeid Al-Hussein: [Zeid Report] at [6]; E F Defeis "UN Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity" (2008) 7 *Washington University Global Studies Law Review* 186 at 189.
[2] Zeid Report, above n 1, at [6].
[3] At [6].
[4] Inter-Agency Standing Committee for the Protection from Sexual Exploitation and Abuse *Frequently Asked Questions* Inter-Agency Training for Focal Points at Question 8 available online <www.pseataskforce.org>: [PSEA FAQ].

that not all sexual relationships are prohibited; instead the focus is on preventing "exploitative" relationships.[5] It is common to find some kind of power imbalance and even coercion in usual everyday relationships outside the context of peacekeeping.[6] Nevertheless, it can be unclear at which point a relationship can be described as "exploitative". As will be discussed in this chapter, one of the major issues with the Secretary-General's *Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse* (S-G Bulletin) and its formal definition of "sexual exploitation" and that it arguably fails to adequately identify the line between an exploitative relationship and a mutually beneficial relationship between two consenting adults. Additionally, the spectrum of relationships that may exist between these is also left unclear. Therefore, the goal of this chapter is not only to examine the concepts of sexual abuse and sexual exploitation but also explore the difficulties associated with describing "exploitative" relationships.

The first section of this chapter will look at the codes of conduct, particularly the S-G Bulletin which provides the substantive definitions for sexual abuse and sexual exploitation. Although they are essentially policy documents, these codes express the current minimum standards of behaviour for UN peacekeepers and provide the basis for disciplinary measures.

The second and third sections will examine the concepts of "sexual abuse" and "sexual exploitation" respectively. In order to explore the meaning of sexual abuse and sexual exploitation I will not only look at the S-G Bulletin, but also inspect other areas of international law to examine similar concepts or terms; including within international criminal law, international humanitarian law, and international human rights law. I will argue that the definition of "sexual abuse" is largely unambiguous and describes conduct

[5] Above n 4.
[6] O Simic *Regulation of Sexual Conduct in UN Peacekeeping Operations* (Springer Berlin, Heidelberg, 2012) at 114.

that could be classified as sexual crimes in international criminal law or clear examples of violence against women under human rights law, for example rape and sexual violence. Conversely, the S-G Bulletin's definition of "sexual exploitation" is not only ambiguous but is difficult to reconcile with similar terms used elsewhere, for example human trafficking for the purposes of sexual exploitation. The fourth section will summarise and identify the forms of conduct that can be drawn from sexual abuse and sexual exploitation in those areas of international law explored in the previous sections.

The fifth section will look at the critics of the zero-tolerance policy, particularly the S-G Bulletin's definition of sexual exploitation. Arguably, the concept of "sexual exploitation" is intended to capture soliciting sex from adult prostitutes and survival-sex-type relationships. However, "sexual exploitation" is defined in such a way that it could include all kinds of sexual activity, including consensual sexual behaviour. Moreover, the definition fails to draw the line between a sexual relationship that is "acceptable" (more or less) and one that is "exploitative". This section will therefore look more closely at the difficulties posed by the grey area between. Additionally, the critics of sexual exploitation expose the tension between two competing approaches ie the conservative "women as victims" on the one hand and the feminist "women as liberated decision-makers" on the other. I will argue that these approaches suggest that local women are either victims or survivors without considering the vast spectrum of circumstances that may exist between.

(1) Sexual Exploitation and Abuse under the Codes of Conduct

In order to facilitate the inquiry into concepts it is helpful to first consider the sources of the zero-tolerance policy; namely, the two UN Codes of Conduct and the S-G Bulletin. These sources are important when determining what type of conduct will fall under "sexual abuse" and "sexual exploitation" and will be referenced throughout the following discussion.

The *Ten Rules: Code of Personal Conduct for Blue Helmets* and *We are United Nations Peacekeeping Personnel* represent the two relevant UN Codes of Conduct.[7] These codes describe the minimum standards of behaviour expected from UN peacekeepers and are binding on all categories of personnel.[8] Drawing on the positive image of the United Nations and peacekeeping, the codes promote abstract concepts such as integrity, impartiality, courtesy and dignity.[9] Moreover, contravening these codes will result in disciplinary measures.[10]

The second source and the most widely quoted document is the S-G Bulletin which sets out the particular definitions for "sexual abuse" and "sexual exploitation". The S-G Bulletin was drafted in 2003 following allegations of sexual exploitation and abuse by humanitarian aid workers in West African refugee camps in 2002 and the subsequent investigation by the Office of Internal Oversight Services (OIOS).[11] As part of the early measures to tackle the problem of sexual exploitation and abuse, the Secretary-General issued the Bulletin to stand alongside other staff regulations and policies already in place.[12] The Bulletin describes its scope of application to include all UN staff and troops acting under the "command and control" of the UN.[13] Since 2007, the Bulletin applies to all peacekeeping personnel.[14]

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[7] UN Conduct and Discipline Unit *Ten Rules: Code of Personal Conduct for Blue Helmets* <http://cdu.unlb.org>; UN Conduct and Discipline Unit *We are United Nations Peacekeeping Personnel* <http://cdu.unlb.org>.

[8] Miller, above n 1, at 82; see also the Memorandum of Understanding between the UN and TCCs Annex H: *Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual)* GA A/c.5/66/8 (2011) ch. 9 Memorandum of Understanding: [2007 MOU].

[9] C Harrington *Politicisation of Sexual Violence: From Abolitionism to Peacekeeping* (Ashgate, Surrey, 2010) at 179.

[10] Millar A J "Legal aspects of Stopping Sexual Exploitation and Abuse in UN Peacekeeping Operations" (2006) *Cornell International Law Journal* 71 at 82; 2007 MOU, above n 8, art 7 *ter*.

[11] OIOS is the investigative arm of the UN, United Nations Secretary-General's Bulletin *Special Measures for Protection from Sexual Exploitation and Sexual Abuse,* UN Secretariat SG ST/SGB/2003/13 (2003): [S-G Bulletin (2003)] at 1.

[12] Miller, above n 10, at 76. Example of other policies include the United Nations Secretary-General's Bulletin *Prohibition of Discrimination, Harassment, including Sexual Harassment, and Abuse of Authority* SGB ST/SGB/2008/5 (2008).

[13] S-G Bulletin (2003), above n 11, at [2.2].

[14] Previous to 2007 there was debate as to whether military contingents were bound by the standards of the Bulletin as typically troops are under the "command and control" of their contributing state. The inclusion of

Furthermore, the Bulletin labels the described conduct as "serious misconduct" which will result in disciplinary proceedings or other administrative action.[15] The target audience is not states themselves, but rather individual UN staff and peacekeeping personnel.[16]

The UN codes of conduct and the S-G Bulletin are policy documents rather than law. This means that although administrative or disciplinary measures will be taken against individual personnel for any breach, they do not, on their own, purport to obligate troop-contributing-countries to criminalise the described conduct.

(A) THE UN CODES[17]

The UN Codes of Conduct describe minimum standards of expected behaviour and may form the basis of disciplinary action against those who breach them.[18] Provisions governing interactions with the local population in the two codes do not explicitly address sexual exploitation and abuse but offer broad descriptions of expected conduct. The *Ten Rules: Code of Personal Conduct for Blue Helmets* state that personnel are to refrain from "indulg[ing] in immoral acts of sexual, physical or psychological abuse or exploitation of the local population ... especially women and children".[19]

Similarly, the relevant section of *We are United Nations Peacekeepers* reads "we will never ... commit any act that could result in physical, sexual or psychological harm or suffering to

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the Bulletin in the Memorandum of Understanding in 2007 binds all categories of personnel see generally Z Deen-Racsmary "The Amended UN Model Memorandum of Understanding: A new Initiative for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents?" (2011) *Journal of Conflict and Security Law* 321.

[15] S-G Bulletin (2003), above n 11, at [3.2(a)] and [3.3].

[16] At [2.1].

[17] The English language versions of these codes were exclusively used for the purposes of the following interpretation. It does not preclude other interpretations that might be possible from reading the French or other language versions of the Codes.

[18] "may" is used here because it is the responsibility of the TCC to ensure the Codes of Conduct are adhered to, their incorporation in the MOU means that the TCC must make sure the Codes are binding on their national contingents see Defeis, above n 1, at 193-194.

[19] *Ten rules*, above n 7, at Rule 4.

members of the local population, especially women and children".[20] The code also directly deals with sexual relationships stating that "we will never ... become involved in sexual liaisons which could affect our impartiality or the wellbeing of others".[21]

When looking at sexual conduct, the UN codes draw on the idea of morality (differentiating "immoral" and "moral" sexual behaviour) and impartiality without defining what is meant by these terms. This kind of classification is unhelpful when looking to define what conduct constitutes sexual exploitation and abuse as it is inherently subjective.[22] What is "moral" sexual behaviour to one person may be considered "immoral" to someone else, regardless of consensual sexual activity, and their interpretation can be dependent on many factors, including the social context of both the peacekeeper and the victim. Therefore, it is difficult to discern what behaviour is expected by looking solely at these codes; other than prohibiting "immoral" sex or sexual relationships that may or may not affect impartiality.

The zero-tolerance policy has not always been fully appreciated by peacekeeping personnel. In particular there have been claims of ambiguity about what sexual relationships may be considered "exploitative".[23] Typically the UN codes of conduct are distributed among peacekeepers in card-form to be kept on their person whilst on duty.[24] Although they are also attached to the Memorandum of Understanding,[25] they are sometimes regarded by personnel as "just another piece of paper".[26] Indifference to the codes can be compounded

[20] *We are UN Peacekeepers*, above n 7, at 3.
[21] At 3.
[22] See generally S Hayes and B Carpenter "Out of Time: The Moral Temporality of Sex, Crime and Taboo" (2012) 20 *Critical Criminology* 141.
[23] Particularly under the S-G Bulletin (2003), above n 11 at [3.3]; see also Dr T Awori, Dr C Lutz and General P J Thapa (leaked March 2015) *Final Report: Expert Mission to Evaluate Risks to SEA Prevention Efforts in MINUSTAH, UNMIL, MONUSCO, and UNMISS* (2013) at 14-15.
[24] Identified by the Group of Legal Experts in 2006, see *Report of the Group of Legal Experts on Ensuring the Accountability of United Nations Staff and Experts on Mission with Respect to Criminal Acts Committed in Peacekeeping Operations* GA A/60/980 (2006) [First Group of Legal Experts Report] at [17].
[25] The UN Codes are combined into one document which is attached as an annex to the Memorandum of Understanding, for further discussion see Chapter Three: Agreements with the United Nations.
[26] P Higate "Peacekeepers, Masculinities, and Sexual Exploitation" (2007) 10 *Men and Masculinities* 99 at 112.

by the fact that prohibited sexual conduct (that may be "serious misconduct" under the S-G Bulletin) sits alongside less serious wrongdoing, such as standards concerning UN property.[27] When considering these codes together, the difficulty in identifying what conduct will constitute "misconduct", "serious misconduct" or even "criminal" sexual conduct has led to confusion and a lack of compliance.[28] It is difficult to expect peacekeepers to adhere to codes of conduct where such ambiguity exists.

The UN codes are not written with the intention of establishing criminal liability although criminal behaviour may be included. They do not purport to obligate member states to criminalise the described conduct. Instead, the codes are standards of behaviour that sit alongside other staff regulations and policies and they apply to all peacekeeping personnel.[29]

(B) STATUS OF THE S-G BULLETIN

The *Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abus*e (the S-G Bulletin) provides the substantive definitions which currently form the basis of any subsequent UN inquiry into sexual exploitation and abuse. Therefore, it is important to explore the legal status of the Bulletin.

Taking a legal positivist point of view, the S-G Bulletin is unlikely to fall under the "sources of international law" as provided for under the Statute of the International Court of Justice. Article 38(1) lists three major sources of law; international conventions,[30] international custom[31] and general principles of law.[32] The S-G Bulletin cannot be categorised as a treaty;

[27] For example, see *Ten Rules*, above n 7, at Rule 6.
[28] First Group of Legal Experts Report, above n 24, at [17].
[29] Will apply to military contingents through their incorporation in the MOU see generally Deen-Racsmary, above n 14.
[30] *Statute of the International Court of Justice* 1 UNTS xvi (opened for signature 26 June 1945, entered into force 24 October 1945) art 38(1)(a).
[31] At art 38(1)(b).
[32] At art 38(1)(c).

it is not concluded with other international actors (such as states or international organisations). The Bulletin is unlikely to establish customary international norms or general principles on its own. Customary international law needs evidence of substantial state practice and *opinio juris* (what states believe) relating to the fact these documents are legally binding on states.[33] Where the Bulletin is referenced, it is in relation to policy or as collective code of conduct for individual personnel, rather than having a focus on states themselves (therefore making it difficult to argue that states believe this is a legally binding source of law).[34] In relation to the definitions within, as will be discussed below, the definition of "sexual exploitation" is somewhat unique to the Bulletin itself, thereby making it difficult to argue that the Bulletin is a general principle of international law (it includes standards which are not internationally agreed, such as soliciting sex from prostitutes as being inherently exploitative behaviour).[35] In what terms then can the Bulletin be categorised?

It is more likely that the Bulletin simply represents policy rather than law, soft or otherwise. Soft law can be described as non-binding legal instruments that can either be evidence of existing norms or the manifestation of steps toward law-making; for example, General Assembly Resolutions.[36] Although they are not strictly speaking legally-binding on states, General Assembly Resolutions may be evidence of state practice and therefore form part of normative development.[37] The common trend, much like traditional sources of international

[33] M Shaw *International Law* (6th ed, Cambridge University Press, Cambridge, 2008) at 72-93.
[34] See for example *Report of the Special Committee on Peacekeeping Operations and its Working Group* GA A/59/19/Rev.1 (2005) at [8] where the Bulletin is referred to as forming part of the standards and regulations of UN staff; General Assembly *United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel* GA Res A/RES/62/214 (2008) where the Bulletin is included under standards of conduct and regulations for personnel; General Assembly *Summary record of the 9th Meeting* GA A/C.6/66/SR.9 (2011) at [23] where a member state (Columbia) noted that norms described in the Bulletin would need to be adopted through another instrument to be legally binding on states themselves.
[35] See generally H Thirlway "The Sources of International Law" in M D Evans (ed) *International Law* (4th ed, Oxford University Press, Oxford, 2014) 91, at 104-105.
[36] See generally A Boyle "Soft Law in International Law-Making" in M Evans (ed) *International Law* (3rd ed) (Oxford University Press, Oxford, 2010) 122.
[37] At 134-135.

law, is that such "soft law" instruments engage with states or international organisations directly in an attempt to influence their conduct.[38] In contrast, the S-G Bulletin purports to influence or bind the behaviour of individuals, in particular UN staff and peacekeeping personnel (in international law terms, non-state actors). The Bulletin, on its own,[39] does not address conduct of states themselves. This is supported by looking at the history of the Bulletin itself. As noted above it was developed to sit alongside other policies and procedures for UN staff and contribute to the codes of conduct. It is perhaps better to describe the Bulletin as "internal law" of the United Nations, thus forming part of the administration of the Secretariat.[40] As such, the codes are rules or regulations rather than instruments that give rise to legal obligations.

Some academics have made reference to the S-G Bulletin "criminalising" all forms of sexual exploitation and abuse in peacekeeping.[41] However, it is highly unlikely that the S-G Bulletin was drafted with the intention to create criminal law. As identified in the Group of Legal Experts' Report, it was not intended that the Bulletin identify *criminal* sexual conduct.[42] Instead the Bulletin focuses on defining misconduct.[43] Although the definitions themselves include conduct that may be criminal according to the domestic laws of the host or contributing states, the Bulletin does not purport to obligate member states to criminalise

[38] At 122-123.
[39] There may be an argument to suggest that through its incorporation in the MOU, the S-G Bulletin can then be considered to attempt to bind member states, this will be discussed further in Chapter Three.
[40] See ICRC and UCIHL *Expert Meeting on Multinational Operations Report: Applicability of Humanitarian Law and International Human Rights Law to UN Mandated Forces* (Geneva, December 2003) for the discussion of the legal status of the S-G Bulletin on *the Observance by United Nations forces of international Humanitarian Law.* It was agreed that the Bulletin was better described as the internal law of the UN, at 10ff. This can also be applied to the S-G Bulletin on sexual exploitation and abuse. See also R Murphy *United Nations Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues in Practice* (Cambridge University Press, Cambridge, 2007) at 234; G Verdirame *The UN and Human Rights: Who Guards the Guardians?* (Cambridge University Press, Cambridge, 2011) at 207.
[41] For example, see M Ndulo "The United Nations Response to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers During Peacekeeping Missions" (2009) 27 *Berkeley Journal of International Law* 127 at 146.
[42] First Group of Legal Experts Report, above n 24, at [17].
[43] At [17].

sexual exploitation and abuse pursuant to the particular definitions provided. In sum, the Bulletin primarily acts as a code of conduct or policy and not a vehicle for criminal prosecution. Instead, it is through its incorporation in the Memorandum of Understanding (MOU) between the UN and contributing states that obligations on states to prosecute criminal conduct may arise (an issue that will be discussed further in Chapter Three below).

In summary, the above documents represent the main sources of the UN's zero-tolerance policy; they are the vehicle through which sexual exploitation and abuse are prohibited. Contravening these codes will result in administrative measures; they prescribe standards of conduct of individuals but do not impose legal obligations on states. As the UN codes and the S-G Bulletin, by themselves, cannot be said to have been drafted with the intention of creating criminal offences, it is helpful to look at different areas of international law for similar terms/definitions to explore further the concepts of sexual abuse and sexual exploitation.

(2) Sexual Abuse

Although the S-G Bulletin is unlikely to be a source of law, it does provide substantive definitions of sexual abuse and sexual exploitation upon which serious misconduct may be investigated. Therefore, the Bulletin will be the starting point for the following two sections. I will begin this section by unpicking the particular definition of sexual abuse provided by the Bulletin. I will then look at other international instruments or areas of law for similar terms in order to explore how "sexual abuse" has been used in other contexts.

Arguably, it is somewhat easier to identify the concept of "sexual abuse" and what kind of conduct would be classified as sexual abuse than "sexual exploitation". Overall, I will argue that sexual abuse is largely unambiguous and describes conduct that could be classified as

sexual crimes in international (or domestic) criminal law or clear examples of violence against women under human rights law, for example rape and sexual violence.

(A) S-G BULLETIN DEFINITION

According to the S-G Bulletin, sexual abuse means "the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions."[44]

It is arguable that rape and other forms of sexual violence would fall under this definition from the words "physical intrusion of a sexual nature" and the reference to coercion and force. This can be supported by similar definitions of "rape" used by the ad hoc international criminal tribunals ie the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

For the purposes of prosecuting rape as part of the international crimes of genocide and crimes against humanity, including torture, inhuman treatment and enslavement, the ad-hoc tribunals have developed an applicable definition. The International Criminal Tribunal for Rwanda defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive".[45] Like "sexual abuse", the ICTR definition takes a coercive context into consideration. "Circumstances which are coercive" has been held to include threats or intimidation and duress drawing on circumstances of desperation.[46] These explanations can be associated with the "unequal conditions" aspect of sexual abuse. As discussed above, one of the fundamental elements of sexual exploitation and abuse is the unequal power dynamics between peacekeepers and the local population. Similar concepts

[44] S-G Bulletin (2003), above n 11, at 1.
[45] *The Prosecutor v. Jean-Paul Akayesu (Judgment)* ICTR Trial Chamber ICTR-96-4-T, 2 September 1998 at [688].
[46] D Cohen "Prosecuting Sexual Violence from Tokyo to the ICC" in M Bergsmo et al. (eds) *Understanding and Providing International Sex Crimes* (Beijing, Torkel Opsahl Academic EPublisher, 2012) at 26.

of abuse of power underlie the ICTR's definition of rape.[47] Furthermore, the words "physical invasion of a sexual nature" used by the ICTR have similar connotations to "physical intrusions of a sexual nature" as defined under the S-G Bulletin.[48] In light of its similarity, it will be assumed that "sexual abuse" as defined by the S-G Bulletin would include acts of rape.

A related issue that springs from the similarity between the ICTR's definition of rape and the S-G Bulletin's definition of "sexual abuse" is the absence of consent. In many common law jurisdictions consent is often a central element when prosecuting domestic crimes of rape.[49] Of course, this will only become an issue when the situation of criminal prosecution arises. Nevertheless, reference to force or coercion envisions circumstances in which there is a lack of consent (either altogether or genuine) which would also support rape falling under "sexual abuse".[50] Other jurisdictions require evidence of force or the threat of force which can be reflected in the definition by the words "the actual or threatened physical intrusion of a sexual nature".[51]

Similarly, sexual violence has been given a definition for the purposes of international criminal law.[52] The definition has been largely borrowed from the 1998 UN report *Contemporary Forms of Slavery* regarding the sexual exploitation of women during armed conflict.[53] Sexual violence is defined as:[54]

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[47] Amnesty International *Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court* (Amnesty International publications, London, 2011) at 26.
[48] Both phrases envision sexual penetration, but could also include other forms of "sexual intrusions" or "invasions" short of penetration see Cohen, above n 46, at 25.
[49] *Prosecutor v Furundzija (Judgment)* ICTY Trial Chamber IT-95-17/1-T, 10 December 1998 at [180].
[50] Cohen, above n 46, at 29.
[51] At 26.
[52] Leading definition of "sexual violence" for the purposes of international crimes can be found in *Prosecutor v Furundzijia,* above n 49, at [186].
[53] *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict* Final Report, submitted by G J McDougall, Special Rapporteur E/CN.4/Sub.2/1998/13 (1998).
[54] At [21].

> ... any violence, physical or psychological, carried out through sexual means or by targeting sexuality. Sexual violence covers both physical and psychological attacks directed at a person's sexual characteristics, such as forcing a person to strip naked in public, humiliating a person's genitals, or slicing off a woman's breasts.

Sexual violence therefore includes the use of physical force or psychological coercion, which certainly falls within the meaning of "sexual abuse". Therefore, it will be assumed that sexual abuse in the S-G Bulletin intends to include acts of sexual violence.

(B) OTHER DEFINITIONS OF "SEXUAL ABUSE"

When looking at the specific term "sexual abuse" it should be noted that although it can be found elsewhere in international law, it is seldom defined. Security Council Resolution 1325[55] concerning the protection of women and children in armed conflict refers to "sexual abuse". Paragraph 10 of the resolution "calls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse ..." It is important to note that here rape is considered a form of "sexual abuse" thus supporting the above discussion.

Sexual abuse has also been referenced in some human rights treaties, particularly those concerning sexual activity with children. As a significant number of allegations of sexual abuse involve children such instruments are relevant.[56] Moreover, the *Convention on the*

[55] *Security Council Resolution 1325* SC Res S/Res/1325 (2000).
[56] In his 2012 report on sexual exploitation and abuse, the Secretary-General noted that 30% of allegations involved children see Secretary-General *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* GA A/66/699 (2012) at [12].

Rights of the Child (CRC)[57] proved to be particularly influential in the development of the Bulletin's definitions.[58] The CRC art 34 requires state parties to:

> ... undertake to protect the child from all forms of sexual exploitation and sexual abuse. For those purposes, State Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
>
> (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
>
> (b) The exploitative use of children in prostitution or other unlawful sexual practices;
>
> (c) The exploitative use of children in pornographic performances and materials.

From looking at art 34 CRC, it is likely that sex with minors (including transactional sex) would also fall within the meaning of "sexual abuse", particularly with the reference to inducement or coercion in sub-paragraph (a).[59]

Similar provisions can be found in regional human rights treaties. The *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* obligates member states to criminalise particular sexual behaviour regarding children and specifically defines the conduct that would fall under "sexual abuse".[60] Similar to the CRC,

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[57] *Convention on the Rights of the Child* 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).
[58] *Report of the Office of Internal Oversight Services on the Investigation into Sexual Exploitation and Abuse by aid workers in West Africa* GA A/57/465 (2002) at [9].
[59] See also *Report of the World Congress against Commercial Sexual Exploitation of Children, Stockholm, Sweden, 27-31 August 1996, Part I and II* (Stockholm, 1996); see generally V Muntarbhorn *A commentary on the United Nations Convention on the Rights of the Child: Article 34 Sexual Exploitation and Sexual Abuse of Children* (Martinus Nijhoff Publishers, Leiden, 2007).
[60] *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* CETS No: 201 (opened for signature 25 October 2007, entered into force 1 July 2010) arts 18-23.

art 19(b) of the Convention makes reference to coercion of a child to engage in sexual activity. The contents of art 34 of the CRC are also found in the *African Charter on the Rights and Welfare of the Child*.[61]

From the above discussion it is possible to determine that rape and sexual violence would most certainly fall within the meaning of "sexual abuse" under the S-G Bulletin. Moreover, sexual activity with minors (including transactional sex with children) would also fall under "sexual abuse". Consequently, any attempt to commit any of these acts will also breach the S-G Bulletin's definition. Rape and sexual violence have been considered crimes under international criminal law and international humanitarian law.[62]Although it is unclear whether rape and sexual violence on their own are violations of human rights,[63] they have been considered forms of torture, inhuman and degrading treatment and are clear examples of violence against women.[64]

In sum, the S-G Bulletin's definition of "sexual abuse" can be closely compared with the ICTR's definition of "rape" under international criminal law. Moreover, descriptions of "sexual violence" could also align with sexual abuse. Although the term "sexual abuse" has not been widely defined elsewhere in international law, there is an argument to suggest that

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[61] *African Charter on the Rights and Welfare of the Child* OAU CAB/LEG/24.9/49 (entered into force 29 November 1999) art 27(1)-(c).

[62] Rape and Sexual Violence have been said to constitute war crimes under international humanitarian law see *The Prosecutor v. Jean-Paul Akayesu*, above n 45; *Rome Statute of the International Criminal Court* 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002) [Rome Statute] art 8(b).

[63] The *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* (opened for signature 6 September 1994, entered into force 3 May 1995) is the only major human rights treaty to explicitly refer to rape and sexual violence as a breach of human rights. See D S Mitchell "The Prohibition of Rape in International Humanitarian Law as a norm of *jus cogens;* clarifying the Doctrine" (2004-2005) 15 *Duke Journal of Comparative and International Law* 219 at 245; also specifically noted as a breach of human rights in the *World Conference on Women: Declaration of Mexico on the Equality of Women and their Contribution to Development and Peace* E/CONF.66.34 (1975) at [28].

[64] Rape and sexual violence were specifically referred to in the definition of "violence against women" in the *United Nations Declaration on the Elimination of Violence against Women* GA Res A/RES/48/104 (1994) art 2; See also A Edwards "Everyday Rape: International Human Rights Law and Violence against Women in Peacetime" in C McGlynn and V E Munro (eds) *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, New York, 2010) 92 at 100. I will discuss the concept of violence against women in more detail below.

the S-G Bulletin's definition represents sexual crimes or clear examples of violence against women. Sexual abuse envisions violence, force and coercion; it has an identifiable character to its definition. In contrast, "sexual exploitation" is more ambiguous.

(3) SEXUAL EXPLOITATION

The concept of sexual exploitation is closely linked to the idea of vulnerability and abuse of power. The UN, when first responding to allegations of sexual exploitation and abuse, was mostly concerned with peacekeeping personnel exploiting the vulnerability of the local population and abusing their authority or power for sexual purposes.[65] Of particular concern were instances where personnel would exchange sex for services, food or money which is already due to the local population.[66] This so-called "survival sex" situation would sometimes result in an on-going relationship or perhaps evolve from one already in existence.[67] Although survival sex is arguably targeted by the S-G Bulletin's definition of "sexual exploitation", the definition is ambiguous enough to catch other types of relationships, including those that fall in the grey area between exploitation and a mutually beneficial relationship between two consenting adults. This line is not easily drawn and the question as to what constitutes an exploitative relationship and what does not has arguably been left open by the Bulletin.[68]

Using the S-G Bulletin as the guide once more, this section will begin by unravelling the Bulletin's definition of "sexual exploitation". To achieve this it is necessary to break down the definition and explore particular elements; these include the "position of vulnerability or deferential power" and the required "exchange". The latter will be further broken down into

[65] Zeid Report, above n 1, at [6].
[66] At [6].
[67] At [6].
[68] And consequentially has been the subject of much criticism from feminist scholars, discussed more below.

two circumstances of such exchanges; firstly, adult prostitution and secondly, survival sex. Again, I will also look at other instruments or areas of law for similar terms in order to explore how the concept of "sexual exploitation" has been used in other contexts. Following this, I will take a step back and consider whether sexual exploitation could be interpreted as violence against women under international human rights law.

Arguably, "sexual exploitation" is a mixed bag: its definition could be comparable to international crimes such as sexual slavery or forced prostitution. At the same time, the definition prohibits the act of buying sex from adult prostitutes which is generally not a violation of any human right (and may or may not be a crime in domestic law). However, it is at least arguable that sexual exploitation as "survival sex" could be considered violence against women under international human rights law; therefore states may have certain international obligations resulting from that.

(A) S-G Bulletin Definition

The Bulletin defines sexual exploitation as "actual or attempted abuse of a position of vulnerability, deferential power or trust for sexual purposes including, but not limited to, profiting from monetarily, socially, or politically from the sexual exploitation of another."[69]

At first glance, the S-G Bulletin's definition appears to be clear. The definition requires an exchange to be made, similar to the concept of prostitution as transactional sex. Common examples of an exchange would be money, food or assistance. In addition to the exchange, there needs to be an abuse of position – of vulnerability and/or of trust. It is this latter requirement that can create difficulties when trying to understand what sexual conduct is prohibited.

[69] S-G Bulletin (2003), above n 11, at 1.

(i) Position of Vulnerability or Deferential Power

The requirement for abuse of a position of vulnerability or trust is based on the purported power imbalance between UN peacekeepers and the local population. The S-G Bulletin makes this clear in section 3.2(d):

> Sexual relationships between United Nations staff and beneficiaries of assistance, since they are based on inherently unequal power dynamics, undermine the credibility and integrity of the work of the United Nations and are strongly discouraged.

As noted in the introduction, "inherent unequal power dynamics" is drawn from the notion that beneficiaries of assistance and peacekeepers sit opposite each other in the host state community.[70] The Zeid Report noted that the UN is often present in post-conflict states with the mandate to offer humanitarian, legal and other assistance to the local population.[71] Consequently, this places peacekeepers in a position of power; they are the hand of the UN in distribution of such help. At the same time, peacekeepers are in a position of trust; the host state and its population trust that representatives of the UN will not exploit the vulnerability arising in situations of post-conflict.[72] According to the Inter-Agency Standing Committee Task Force on Protection from Sexual Exploitation and Abuse (PSEA Task Force), "the foundations of sexual exploitation and abuse are embedded in [such] unequal power relationships".[73] Additionally, unequal power can also be signalled by a financial or material imbalance. Peacekeepers receive regular income for their work and can be

[70] *The Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organisation Mission in the Democratic Republic of the Congo*, 5 January 2005, A/59/661 at [23].
[71] Zeid Report, above n 1, at [6].
[72] At [6].
[73] Annex I "Report of the Inter-Agency Standing Committee Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises" in *Report of the Office of Internal Oversight Services on the Investigation into Sexual Exploitation and Abuse by aid workers in West Africa* GA A/57/465 (2002) at [2].

contrasted with the pressing problem of local poverty.[74] Such power imbalances can also be based on gender; these can be pre-existing in the particular culture of the host state,[75] and also be brought with members of the contributing country.[76] This contextual problem will be further explored below.[77]

Section 3.2(d) of the Bulletin makes the additional point that sexual relationships between UN personnel and "beneficiaries of assistance" are strongly discouraged. The expression "beneficiaries of assistance" does not always refer to the local population generally; it is dependent on the mandate of the Peacekeeping Operation (PKO) which will specify a particular group that receives assistance and which the UN serves. In some instances the subjects of mission assistance will be the local population generally, including refugees.[78] Although this particular term has been used, it has been stressed that the focus should not be on whether the individual is a "beneficiary of assistance" but whether the relationship is one that exploits a position of trust or deferential power.[79]

Although high-level UN officials and policy-makers have accepted the idea that a power imbalance exists between peacekeepers and the local population, the zero-tolerance policy is not a blanket rule against sexual relationships between individuals from these respective groups; instead, only *exploitative* relationships are prohibited. Under the zero-tolerance policy, the relationship or sexual conduct may be considered exploitative regardless of consent or individual agency. The S-G Bulletin makes no reference to consent (or lack of)

[74] Ndulo, above n 41, at 145; see also Awori et al, above n 23, at 6.
[75] Pre-existing power-imbalances based on gender can also be seen as "normal" by visiting peacekeepers. Therefore it can be tempting for contingent members to engage in such behaviour, for example prostitution and sexual activities with girls under the age of 18 years; see Zeid Report, above n 1, at [2].
[76] "Report of the Inter-Agency Standing Committee Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises", above n 73, at [9(c)]; see also Awori et al, above n 23, at 6-7.
[77] Discussion: Feminism & "Sexual Exploitation."
[78] See UN Interim Administration Mission in Kosovo *Frequently Asked Questions and Answers* Question 2.2 available online <http://www.unmikonline.org>.
[79] PSEA FAQ, above n 78, at Question 19.

or even force or coercion leading to the natural conclusion that consensual or voluntary sexual relationships may be caught under this definition, if such activity is "exploitative". It is the nature of the relationship that is the focus of the Bulletin.[80]

(II) AN EXCHANGE: ADULT PROSTITUTION

Although sexual exploitation is based on inherent deferential power between personnel and the local population, an additional element to the definition is an exchange. Prostitution can be described as an exchange of (often) money for sexual purposes. Furthermore, buying sex from prostitutes is also prohibited specifically under section 3.2(c).[81] Peacekeeping missions tend to correspond with an increase in the sex trade in mission areas.[82] The opportunity to pay for sex whilst temporarily deployed in a foreign country has, in some cases, formed part of the masculine culture of the military.[83] Hence, it is not uncommon to see an increase of brothels, cafes, clubs and bars in and around areas in which there are long-term military deployments.[84] Associated risks can include trafficking in women and girls for the purposes of prostitution and organised crime.[85]

The UN's tough stance on soliciting sex from prostitutes in peacekeeping areas stems from evidence regarding human trafficking in the Bosnia and Kosovo missions.[86] The UN itself has noted that it was "extremely difficult to differentiate between trafficking victims and

[80] At Question 15.
[81] Section [3.2(c)] "Exchange of money, employment, goods or services for sex ..." S-G Bulletin (2003), above n 11.
[82] For example, a 2004 list of off-limit areas for troops in the UN Mission in Kosovo showed brothels were situated around UN mission bases. See S E Mendelson *Barracks and Brothels: Peacekeepers and Human Trafficking in the Balkans* (Centre for Strategic and International Studies, Wellington, 2005), at 11; see also K M Jennings and V Nikolic-Ristanovic *UN Peacekeeping Economies and Local Sex Industries: Connections and Implications* (MICROCON Research Working Paper 17, Brighton, 2009) at 3.
[83] See generally Higate P "Peacekeepers, Masculinities, and Sexual Exploitation" (2007) 10 *Men and Masculinities* 99; S Martin *Must Boys be Boys?: Ending Sexual Exploitation and Abuse in UN Peacekeeping Missions* (Refugees International, 2005).
[84] Mendelson, above n 82, at 11.
[85] See generally Amnesty International *"So does that mean I have rights?" Protecting the Human Rights of Women and Girls Trafficked for Forced Prostitution in Kosovo* (London, 2004) at 41ff.
[86] See generally Mendelson, above n 82 and Amnesty International, above n 85.

local prostitution" in Bosnia.[87] Not only did the demand for prostitutes create a market for trafficking, but there was also evidence that peacekeepers themselves were participating in trafficking.[88] Therefore, buying sex from prostitutes was prohibited to help eradicate the demand (and the complicity in) human trafficking.[89] As the official training FAQ on sexual exploitation explains, buying sex from prostitutes is prohibited because:[90]

> … prostitution in war-ravaged societies, developing countries and in countries hosting a peacekeeping mission frequently involves vulnerable women and children, including persons who have been trafficked for sexual exploitation. The vast majority of women in prostitution don't want to be there. Few seek it out or choose it, and most are desperate to leave it … it comes from a lack of choice. The only person with choice is the exploiter.

Therefore, the UN views all prostitution in the peacekeeping context as "de-humanising"[91], "profoundly disturbing" and enabling a life of dependency and exploitation.[92] Again, it is also linked to the position of trust and power that peacekeepers have in the host state; it is the context that turns transactional sex into exploitation. However, it is difficult to find an example elsewhere in international law where prostitution is similarly treated.

According to sources of international human rights law, buying sex from prostitutes is not strictly speaking a breach of human rights. The *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) details under art 6 that "states parties shall take

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[87] United Nations Department of Peacekeeping Operations *Human Trafficking and United Nations Peacekeeping* (Policy Paper, 2004) at [12].
[88] See generally O Simic "Boys will be Boys: Human Trafficking and UN Peacekeeping in Bosnia and Kosovo" in L Holmes (ed) *Trafficking and Human Rights: European and Asia-Pacfic Perspectives* (Edward Elgar, Cheltenham, 2010).
[89] Trafficking for sex work itself is not covered by the definition of "sexual exploitation".
[90] PSEA FAQ above n 78, at Question 22.
[91] At question 23.
[92] Zeid Report, above n 1, at [6].

all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women." The Committee on the Elimination of All Forms of Discrimination against Women's *General Recommendation 19* pointed out that prostitutes are often driven into such work due to economic hardship.[93] Consequentially, it is their marginalised status that makes them susceptible to violence.[94] Essentially, art 6 is about providing prostitutes with protection from human rights violations, such as rape and other violent crimes, not necessarily from the engagement in prostitution itself. However, the act of trafficking young women and girls in order to exploit them for prostitution is recognised as a breach of human rights.[95]

(III) AN EXCHANGE: SURVIVAL SEX

Arguably, the primary focus of "sexual exploitation" under the S-G Bulletin is to address the situation of survival sex. The majority of allegations received by the Conduct and Discipline Unit each year concern survival sex situations and prostitution.[96] Survival sex is a term associated with (predominately) young women and children who engage in sexual relationships with peacekeepers for an (sometimes promised) exchange of nominal material goods or assistance. Examples of typical items exchanged are small amounts of money, biscuits, water and greater access to aid that is already due to them.[97] The goods or assistance exchanged are linked with basics necessary for survival. An example of such a case can be drawn from the OIOS investigations of the 2004 allegations against a number of

[93] Committee on the Elimination of Discrimination against Women *General Recommendation 19* (11th Session, 1992).
[94] Above n 93.
[95] *Convention on the Elimination of All Forms of Discrimination against Women* 1249 UNTS 13 (opened for signatures 18 December 1979, entered into force 3 September 1981) art 6; see also the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, above n 63, art 2(b).
[96] See *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* (2012), above n 56, at [12] where it was noted that situations of survival sex and prostitution made up 58% of all allegations of sexual exploitation.
[97] See for example, *Report into Sexual Exploitation and Abuse by Aid Workers in West Africa*, above n 58, at 9-11.

peacekeepers from the UN Organisation Mission in the Democratic Republic of Congo (MONUC):[98]

> Case A
>
> The girl, identified by OIOS as V046A, was 14 years old and lived with her family. Owing to a lack of finds she did not attend school ... she had had sexual relations with a MONUC soldier who was known to her (PK1). Each time this soldier gave her $1 or $2 or eggs in return.

The Zeid report described this conduct as creating a relationship of dependency.[99] Local women and children often do not have the power to negotiate and risk receiving nothing in exchange at all.[100] Moreover, Prince Zeid expressed concern that items may be given after the fact to "disguise rape as prostitution".[101]

The concept of survival sex is not easily reflected in existing international norms or instruments. Nevertheless, it may be argued that the international crimes of sexual slavery and forced prostitution may apply. These crimes refer to situations where a woman or girl is forced to exchange sex for their own safety or survival.[102] In reality, these women may not be regarded as prostitutes; however, due to the context, where the man has the "dominant position of power" and access to the safety that the woman is dependent on she may be deemed a sexual slave.[103] Such a description can easily be compared with survival sex in

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[98] *The Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organisation Mission in the Democratic Republic of the Congo*, above n 70, at [12].
[99] Zeid Report, above n 1, at [6].
[100] P Patel and P Tripodi "Peacekeepers, HIV and the Role of Masculinity in Military Behaviour" (2007) 14 *International Peacekeeping* 584 at 588.
[101] Zeid Report, above n 1, at [6].
[102] N Quenivet "The Dissonance between the United Nations Zero Tolerance Policy and the Criminalisation of Sexual Offences on the International Level" (2007) 7 *International Criminal Law Review* 657 at 671.
[103] See Women's Caucus for Gender Justice in the International Criminal Court *Recommendations and Commentary* Preparatory Committee (December, 1997) PART III, at WC.5.6.

peacekeeping missions. As was noted above, peacekeepers are in a position of trust and have access to assistance and material goods that the local population does not. Moreover, survival sex creates a cycle of dependency.[104] Sexual slavery and forced prostitution are international crimes (forming part of the crimes of genocide, crimes against humanity, and war crimes) and are limited to the context of armed conflict (which is unlikely to apply to UN peacekeeping missions as peacekeepers are unlikely to be considered "party" to an armed conflict).[105] Although crimes against humanity may also apply during peacetime, there are additional requirements that must be met, for example, the conduct in question (sexual slavery or forced prostitution) must be systematic and form part of a widespread policy to attack or dehumanise the local population.[106] Such a high threshold is unlikely to apply to survival sex which is more likely to be committed for personal reasons and be opportunistic in nature. As the scope of this thesis does not consider international humanitarian law directly, the applicability of sexual slavery and forced prostitution to peacekeepers will not be explored any further. However, survival sex may be considered generally as violence against women (discussed further below).

(B) Other Definitions of "Sexual Exploitation"

When looking for the term "sexual exploitation" (or similar) elsewhere in international law it becomes apparent that it is more likely to be found in the context of anti-trafficking law (for the purposes of prostitution) or in relation to the exploitation of children. Like "sexual abuse", sexual exploitation is rarely defined.

The most recent example of the use of "sexual exploitation" can be found in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,*

[104] Zeid Report, above n 1, at [6]
[105] Quenivet, above n 102, at 671.
[106] Rome Statute, above n 62, art 7.

supplementing the UN Convention against Transnational Organised Crime (2000). Article 3(a) describes exploitation as the following:[107]

> Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services slavery or practices similar to slavery, servitude or the removal of organs.

Although "sexual exploitation" is not defined in the Convention, the *Annotated Guide to the Complete Trafficking Protocol* provided the following model definition for state parties wishing to use it in their domestic legislation:[108]

> Sexual exploitation means the participation by a person in prostitution, sexual servitude, or the production of pornographic materials as a result of being subjected to a threat, coercion, abduction, and force abuse of authority, debt bondage or fraud.

Neither art 3(a) of the Convention nor the *Annotated Guide* describe circumstances that the S-G Bulletin's concept of "sexual exploitation" can be easily compared with. Both correspond with the concept of forced or coerced prostitution which is more likely to compare with the definition of "sexual abuse". However, neither seem to indicate that adult prostitution itself is exploitative in nature. The primary focus of the Convention is to criminalise trafficking of women and children for the purposes of prostitution. It does not quite fit the definition of sexual exploitation used in the S-G Bulletin, particularly survival sex situations.

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[107] *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organised Crime* 2237 UNTS 319 (opened for signature 15 November 2000, entered into force 25 December 2003) art 3(a). See also D Otto "Making Sense of Zero-Tolerance Policies in Peacekeeping Sexual Economies" in V Muno and C Stuchin (eds) *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish, New York, 2007) at 269.

[108] A D Jordon *Annotated Guide to the Complete UN Trafficking Protocol* (Washington DC, Global Rights, 2002) at 5.

Article 34 of the *Convention on the Rights of the Child* (reproduced above) also uses the term "sexual exploitation". As previously noted art 34 resonates with the concept of "sexual abuse". Generally the use of sexual exploitation in the CRC (and other international instruments governing the rights of children)[109] focuses on the act of exploiting children for the purposes of prostitution. It has also been noted that "sexual exploitation" as used in art 34 includes child prostitution.[110] Child prostitution arguably consists of both an exchange and an abuse of power. Such an abuse of power is not only due to the inherent power imbalance as between peacekeepers and beneficiaries of assistance, but there also exists unequal conditions between an adult and a child. Therefore, the use of "sexual exploitation" in this context is more aligned with the definition used in the S-G Bulletin. However, this only covers one scenario of sexual exploitation.

In sum, arguably the S-G Bulletin's definition is meant to include buying sex from adult prostitutes and survival-sex-type relationships. However, the UN's strict approach towards buying sex from adult prostitutes is difficult to reconcile with the general approach taken by human rights law ie that buying sex per se it is not a violation of human rights. Moreover, "survival sex" is largely an unfamiliar concept; although it may be comparable to the international crimes of sexual slavery and forced prostitution. Additionally, "sexual exploitation" has not been used elsewhere in international instruments in the same way as the S-G Bulletin. Therefore, it is perhaps helpful to take a broader view of "sexual exploitation"; for example, exploring whether sexual exploitation can be interpreted as violence against women in human rights law.

[109] For example, the *African Charter on the Rights and Welfare of the Child*, above n 74, at art 27(1)(a)-(c) and the *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, above n 60.
[110] See *Report of the World Congress against Commercial Sexual Exploitation of Children*, above n 59; see also Muntarbhorn, above n 59, at 2.

(C) Sexual Exploitation as Violence Against Women

In the pursuit of gender equality and the realisation of women's human rights, it was acknowledged by many women's organisations around the world that violence perpetrated against women was not only a form of discrimination but also a barrier to the enjoyment of such equality and human rights.[111] However, violence against women, also known as gender-based violence, represents more than just discrimination. According to the *Beijing Platform for Action 1995,* violence against women is "the manifestation of the historically unequal power relations between men and women".[112] Therefore, gendered violence is often rooted in social and cultural structures; such violence can be an expression of (or coincide with) historic subordination of women, cultural justifications for harmful practices against women, economic inequalities and continued denial of women's human rights generally.[113] Consequentially, violence against women has been understood to be more than a private issue as between individuals but also a public issue requiring certain steps to be taken by the state.[114]

Violence against women has been defined in a number of international instruments. It has also been subject to different interpretations depending on the instrument; for example, multilateral documents, such as the *UN Declaration on the Elimination of Violence against Women,*[115] do not recognise violence against women as a breach of human rights but see such violence as a barrier to the full enjoyment of women's human rights.[116] However, some

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[111] Report of the Secretary-General *In-Depth Study of all forms of Violence against Women* GA A/61/122/Add.1 (2006) at [1]-[3].
[112] *Beijing Declaration and Platform for Action* Fourth World Conference on Women (Beijing, 1995) [Platform for Action] at [118].
[113] *In-Depth Study on all forms of Violence against Women,* above n 111, at [65]-[92].
[114] H Charlesworth and C Chinkin *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, Manchester, 2000) at 235.
[115] Above n 64.
[116] A Edwards *Violence against Women under International Human Rights Law* (Cambridge University Press, Cambridge, 2011) at 22.

regional treaties, such as the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women,* have recognised a separate right for women to be free from violence.[117]

The leading definition can be found in the UN Declaration. Although the declaration is non-binding (in the sense that it does not create obligations on member states), the definition has been reproduced in the *Beijing Platform for Action 1995*[118] and the *General Assembly Resolution on Violence against Women 2006*.[119] Article 1 of the Declaration defines violence against women as the following:[120]

> Any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in the private life.

The definition is to be understood as non-exhaustive.[121] Violence against women is thus broadly defined to capture all forms of violence such as physical, sexual or psychological violence. As noted above, rape and sexual violence have been considered clear examples of violence against women.[122] Other examples of violence against women would include femicide, female genital mutilation, psychological or emotional pressure by intimate partners and sexual harassment.[123]

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[117] See *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, above n 63, art 3 "Every woman has a right to be free from violence in both the public and private spheres".
[118] Platform for Action, above n 112, at [113].
[119] *General Assembly Resolution on Violence against Women* GA Res A/RES/61/143 (2006) at [3].
[120] *UN Declaration on the Elimination of Violence against Women*, above n 64, art 1.
[121] At art 1.
[122] *In-Depth Study on all forms of Violence against Women*, above n 111.
[123] See *In-Depth Study on all forms of Violence against Women*, above n 111 and Committee on the Elimination of Discrimination against Women *General Recommendation 19*, above n 93, at [11].

The Declaration's definition also puts the social, cultural and economic inequalities or the systematic power imbalance between men and women at the centre of the problem.[124] This would seem to suggest that sexual exploitation in the context of peacekeeping could be considered violence against women. The Platform for Action noted that women living in poverty are especially vulnerable to such violence and this would tend to align with the context of survival sex.[125] Moreover, the Platform for Action also recognised that women and girls are particularly vulnerable to this kind of violence perpetrated by those in authority, such as security forces, in conflict and post-conflict states.[126] However, it has been noted that violence against women has been limited to inequalities based on gender.[127] Power imbalance based on positions of trust rather than gender may not fit within this particular definition of violence against women.

Taking a regional example, such as the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women,*[128] there is a slightly different definition of violence against women which may include sexual exploitation. Article 1(j) of the African Protocol describes violence against women as:

> All acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflict or of war.

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[124] D Otto "Violence against Women: Something Other than a Human Rights Violation?" (1993) 1 *Australian Feminist Law Journal* 159 at 161.
[125] Beijing Platform for Action 1995, above n 112, at [116].
[126] At [121].
[127] This is due to the word "gender" not being given a separate definition see Edwards *Violence against Women,* above n 116, at 21.
[128] *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women* (opened for signature 11 July 2003, entered into force 25 November 2005): [African Protocol].

Unlike the Declaration, the African Protocol does not limit violence against women to physical acts of violence, but covers "all acts perpetrated against women".[129] Such a wide qualification would enable sexual exploitation to fall within this definition of violence against women. However, as the Protocol is a regional document, its application would depend on whether the host or contributing state were a party.

Violence against women is conceptually part of a broader social context of subordination and gender inequalities. Thus, it is perhaps better to argue sexual exploitation as violence against women under the related concept of intersectionality. The Secretary-General has explained intersectionality as the following:[130]

> The intersection of male dominance with race, ethnicity, age, caste, religion, culture, language, sexual orientation, migrant and refugee status and disability frequently termed "intersectionality" ... [can] make some women more likely to be targeted for certain forms of violence because they have less social status than other women.

There are many different forms of discrimination and inequalities that can be at play between peacekeepers and the local population. Keeping in mind that in any one mission there will be many national contingents made up of different ethnicities, language, cultural backgrounds and differing levels or concepts of male dominance.[131] All these aspects can influence gender-specific discrimination, particularly in the context of militaries.[132] Field research has exposed that some military contingents embrace a very masculine culture where

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[129] Edwards *Violence against women,* above n 116, at 22.
[130] *In-Depth Study of all forms of Violence against Women,* above n 111, at 361.
[131] And these all may be quite different to the ethnicity, language, culture and religion of the host state population see M O'Brien *National and International Criminal Jurisdiction over United Nations Peacekeeping Personnel for Gender-Based Crimes against Women* (PhD, University of Nottingham, 2010) at 32.
[132] C Duncanson "Forces for Good? Narratives of Military Masculinity in Peacekeeping Operations" (2009) 11 *International Feminist Journal of Politics* 63 at 65.

soldiers focus on certain symbols of masculinity; such as the "warrior", "heterosexuality" and domination over the "feminine" can contribute to the objectification and de-humanisation of local women.[133] An example of inequality has already been discussed at length – that of differential power based on the fact that they are "UN peacekeepers".[134]

Economic and social or political inequalities that are pre-existing in the host state may also contribute to local women and girls being marginalised.[135] Peacekeepers are often deployed to post-conflict states where political, legal, and economic structures are substantially deficient. Women and children are more vulnerable during and post-conflict because they are more likely to be displaced, and male relatives are likely to have left for military or employment purposes.[136] Moreover, any gender inequalities that had existed before conflict can be exacerbated by war.[137] A local woman without any long-term economic opportunities carrying the burden of family obligations can be contrasted to a UN peacekeeper who has shelter, income, and aid that is desperately needed by the host state community.[138] Coupled with the concept of differential power, these factors can place local women in a marginalised position.

It can be argued that sexual exploitation is the manifestation of the above inequalities and forms of discrimination that exist the context of peacekeeping.[139] Local prostitutes and those

[133] Patel and Tripodi, above n 100, at 589; A Kronsell *Gender, Sex, and the Postnational Defense: Militarism and Peacekeeping* (Oxford University Press, Oxford, 2012) at 95-99; A Kronsell "Sexed Bodies and Military Masculinities: Gender Path Dependence in EU's Common Security and Defense Policy" (2015) *Men and Masculinities* 1 at 11; J McGill "Survival Sex in Peacekeeping Economies: Re-reading the Zero Tolerance Approach to Sexual Exploitation and Sexual Abuse in United Nations Peace Support Operations" (2014) 18 *Journal of International Peacekeeping* 1 at 24.
[134] See above "(3)(A)(i) Position of Vulnerability or Differential Power".
[135] V Vojdik "Sexual Abuse and Exploitation of Women and Girls by UN Peacekeeping Troops" (2007) 15 *Michigan State Journal of International Law* 157 at 161; see also Awori, above n 23 at 6; Martin, above n 83, at 3 talking about pre-existing sexual violence in West African states and Haiti.
[136] Vojik, above n 135, at 161; Martin, above n 135, at 3.
[137] Vojik, above n 135, at 161; Martin, above n 135, at 3.
[138] S W Spencer "Making Peace: Preventing and Responding to Sexual Exploitation by UN Peacekeepers" (2005) 16 *Journal of Public International Affairs* 167, at 171; McGill, above n 133, at 6.
[139] O'Brien *National and International Criminal Jurisdiction over United Nations Peacekeeping Personnel for Gender-Based Crimes against Women,* above n 131, at 30-34.

engaged in survival-sex-type relationships are arguably marginalised (and therefore rendered vulnerable to violence/exploitation) and reinforce the subordination of women. Prostitution and survival sex treat women's sexuality as a commodity rather than embracing a right of sexual autonomy,[140] such women are unlikely to have any power of negotiation[141] and are less likely to make a complaint to local authorities.[142] At least, this is the argument taken up by the UN within the zero-tolerance policy and has its critics (I will illustrate this below). Therefore, I contend that it is at least arguable that sexual exploitation could be considered violence against women. I will further clarify below that sexual exploitation should be considered survival sex only.

(4) Sexual Exploitation and Abuse: Summary of Identified Conduct Under the United Nations' Definitions

Having unpacked the S-G Bulletin's definitions of "sexual abuse" and "sexual exploitation" and also looked to other areas of the law for guidance as to their likely meaning, it is useful to identify the particular sexual conduct that the zero-tolerance policy has targeted. Therefore, this section will summarise the conduct identified and point out the particular international norms that are likely to cover such conduct.

Rape, sexual violence and sexual activity with children represent the identified conduct of "sexual abuse". The term and its definition have been used consistently elsewhere in international law; it has an identifiable character and is unambiguous. However, it is arguably more difficult to identify conduct under the S-G Bulletin's definition of "sexual exploitation".

[140] At 33.
[141] Discussed more below.
[142] Vojdik, above n 135, at 161.

Although human trafficking conventions have used the phrase "sexual exploitation" I noted that it has not been used in the same way as the S-G Bulletin. The Bulletin's definition prohibits buying sex from prostitutes and survival-sex-type relationships with local women. Conversely, the use of "sexual exploitation" in the human trafficking context focuses on the movement of people for the purposes of exploiting them for prostitution. Therefore, I will not be looking at human trafficking for the purposes of this paper since it does not offer an adequate comparison. Instead, I will look at sexual exploitation as violence against women. I will further qualify what I mean as "sexual exploitation" when I take a feminist analysis below.

Notwithstanding the conduct identified here, I noted above that "sexual exploitation" is an ambiguous term. This ambiguity has been picked up by academics, particularly feminist scholars. Consequently, sexual exploitation, and the zero-tolerance policy generally, has been the subject of much criticism. In order to gain a more thorough understanding of sexual exploitation it is necessary to explore the term's conceptual development and the feminists' critique in more detail.

(5) Discussion: Feminism & "Sexual Exploitation"

Arguably, from its inception in the 2002 OIOS investigations of allegations in West Africa, "sexual exploitation" was defined in order to target the exploitation of a particular vulnerable group, those local women or girls engaged or tempted to engage in survival-sex-type relationships with peacekeeping personnel. Specifically, exchanging sex for assistance peacekeepers have access to or which are otherwise owed to the local population. It is about the differential power in these circumstances and the abuse of that power. However, the S-G Bulletin's definition can be interpreted to capture a much wider group than that, from those involved in mutually beneficial and consensual adult relationships to those that are

coerced in some way into survival-sex-type relationships. Even within "survival sex" there can be various levels of agency and negotiation operating. Consequently, it is unclear at what point in the vast spectrum of relationships that exist which relationship can be deemed "exploitative".

The ambiguous nature of "sexual exploitation" as defined has been the subject of much criticism, particularly from feminist scholars. In fact, the definition, and the zero-tolerance policy generally, exposes the tension between two competing approaches. On the one hand, there is the conservative "women as victims" approach. This is reflected in the position taken by the UN under the zero-tolerance policy.[143] This is the view that women of the host state are inherently vulnerable to exploitation and abuse by peacekeeping personnel because of their position as beneficiaries of assistance, their reliance on peacekeepers to distribute such assistance and the consequential power and trust bestowed on peacekeepers.[144] In this view transactional sex of any kind is also exploitative (from adult prostitution to survival sex). On the other hand, there is the "women as liberated decision-makers" approach. This is the view that women in the host state are not "victims" but "survivors" who may choose to engage in sexual relationships with peacekeepers for many different reasons including *inter alia* a means of employment, love and attraction, adventure and sometimes marriage.[145]

These feminist approaches, of the conservative "women as victims" on one side and "women as liberated decision-makers" on the other, do little to solve the ambiguous nature of "sexual exploitation". This is due to the extreme nature of the positions taken. As will be discussed in this section, to take either of these approaches on their own, with women being regarded

[143] For example, Quenivet, above n 162, at 668; see also Spencer at 138.
[144] Noted in Quenivet, above n 102, at 668.
[145] See generally Simic *Regulation of Sexual Conduct in UN Peacekeeping Operations*, above n 6; see also *Report of the Office of Internal Oversight Services on the Investigation into Sexual Exploitation and Abuse by aid workers in West Africa*, above n 58, at [11].

as either victims or liberated decision-makers, means there is little consideration given to the spectrum of different relationships that can exist between peacekeepers and individual local women or the intersection of oppression that may exist. However, the critics do offer some notable points about the (in)action of the UN to combat the arguable driving forces behind sexual exploitation, however conceived, particularly the context of poverty and harmful masculinities.

In order to explore the criticisms of "sexual exploitation" and relevant feminist approaches it is necessary to first briefly consider the conceptual foundations of the S-G Bulletin's definition. Subsequently, this section will then analyse the major critics and their arguments. In the end, it is the "women as victims" approach that has been taken by the UN and is reflected in the S-G Bulletin's definition. Thus, the concept and definition used under the zero-tolerance policy presents particular issues for possible avenues for accountability at the outset.

(A) Conceptual foundations of Sexual Exploitation

The concept of sexual exploitation had its beginnings in terms of the UN's response to undesirable conduct by peacekeepers with the first major investigation by the Office of Internal Oversight Services into allegations against West African aid workers in 2002. From there, a definition was posed by the Inter-Agency Standing Committee for the Protection from Sexual Exploitation and Abuse (PSEA Task Force).[146] This specific definition later turned up in the S-G Bulletin.

During the 2002 investigation of West African aid workers, the Office of Internal Oversight Services developed a working definition of "sexual exploitation" to facilitate its inquiry. The

[146] "Report of the Inter-Agency Standing Committee Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises", above n 73, at [8].

definition detailed the particular circumstances that many of the allegations brought to light:[147]

> ... situations in which an international NGO, humanitarian or aid worker, in a position of power, uses that power to request sexual favours or benefits by trading food or services that refugees are entitled to receive free of charge.

The above arguably describes the situation of survival sex. The definition used by the OIOS was picked up by the PSEA Task Force in a Plan of Action[148] (later transferred into the S-G Bulletin). From the inception of the definition I argue that the primary scenario "sexual exploitation" seeks to protect is that of survival sex. This situation of "survival sex" can be understood as the exchange of sex for services, money or assistance to which peacekeepers have access and to which locals are already entitled.[149] As will be seen below, the wider definition eventually adopted under the S-G Bulletin is broad enough to capture many forms of transactional sex. Moreover, the S-G Bulletin's definition has brought about confusion regarding the concept of exploitative relationships. The fact that the definition does not differentiate between coercive and voluntary sexual behaviour has drawn some criticism from feminist scholars.

(B) THE FEMINISTS' CRITIQUE

The S-G Bulletin's definitions of sexual abuse and sexual exploitation have seldom been the subject of in-depth analysis in academic discourse; however, there are a growing number of

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[147] *Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organisation Mission in the Democratic Republic of the Congo,* above n 70, at 1.

[148] "Report of the Inter-Agency Standing Committee Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises", above n 73, at [8].

[149] As evidenced by the detailed discussion on the context of exploitation by the Inter-Agency Standing Committee describing conduct of greatest concern which aligned significantly with the idea of survival sex, see "Report of the Inter-Agency Standing Committee Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises", above n 73, at [5]-[6]. See also the Zeid Report, above n 1, at [6].

feminist scholars that have tackled the interpretation of the zero-tolerance policy on which the S-G Bulletin is based. Few scholars will deny that local women and children need to be protected from coercive or violent sexual conduct, such as rape. As a result, the prohibition of "sexual abuse" under the zero-tolerance policy is generally supported. Differences in opinion arise however in regard to the concept of sexual exploitation, specifically the issue of consensual sexual relationships potentially being caught under the definition and the prohibition of all kinds of transactional sex.

Scholars advocating the "women as liberated decision-makers" point of view[150] are strong critics of the UN's zero-tolerance policy and specifically the S-G Bulletin's definition of "sexual exploitation". There are three major criticisms. Firstly, that the zero-tolerance policy removes the possibility of mutual and consensual sexual relationships and does not take into consideration the point of view of the so-called "victim". Secondly, the Bulletin does not consider the legitimacy of the survival aspect of transactional sex and, more broadly, the legitimacy of sex work. Thirdly, the policy incorrectly labels sex as the problem and ignores the context in which the sex occurs, particularly poverty, pre-existing inequalities, and harmful masculinities within military contingents.

Taking the first of these criticisms and exploring it in more depth, as noted above, sexual exploitation under the S-G Bulletin has the capacity to include entirely voluntary and consensual relationships between peacekeepers and local women. Effectively, as the UN has identified an inherent power imbalance between peacekeepers and beneficiaries of assistance, all local women and girls have arguably been labelled as potential "victims"

[150] For example, Otto "Making Sense of Zero-Tolerance Policies in Peacekeeping Sexual Economies", above n 107; Harrington (2010), above n 9; K M Jennings "Service, sex, and Security: Gendered Peacekeeping Economies in Liberia and the Democratic Republic of the Congo" (2014) 45 *Security Dialogue* 313; Jennings and Nikolic-Ristanovic, above n 95; A R Kolbe "It's Not a Gift When it Comes with Price": A Qualitative Study of Transactional Sex between UN Peacekeepers and Haitian Citizens" (2015) 4 *Stability: International Journal of Security & Development* 1; McGill, above n 133; O Simic *Regulation of Sexual Conduct in UN Peacekeeping Operations*, above n 6.

before any such relationship has been entered into. However, some feminist scholars suggest that the zero-tolerance policy wrongly denies women's agency in such sexual relationships.[151] Additionally, the definition of sexual exploitation does not make a distinction between coerced/forced and voluntary sex.[152]

There are notable gaps in research regarding local women's perspectives on the zero-tolerance policy, specifically the notion of sexual exploitation. As an attempt to fill this gap, Olivera Simic undertook empirical research in Bosnia and Herzegovina in which she questioned three subject groups about their views on the zero-tolerance policy.[153] The most relevant group was made up of local Bosnian women who were engaged in sexual relationships with peacekeepers throughout the duration of the UN mission.[154] Simic questioned these women about the themes presented by the zero-tolerance policy, including questions relating to positions of power, both within their relationships and the overall concept of "inherent unequal power" between peacekeepers and beneficiaries of assistance. The intended outcome of the research was to expose the difference between coerced and voluntary sexual relationships.[155]

Simic hypothesised that women had legitimate reasons to enter into relationships with peacekeepers and that not all women believed they were being "exploited" for sexual purposes.[156] The relevant group of women interviewed had different types of relationships with peacekeepers (both military and civilian contingent members); ie some had married or had long-term plans, others had short-term or less serious relationships.[157] Purported reasons

[151] For example, Otto "Making Sense of Zero-Tolerance Policies in Peacekeeping Sexual Economies", above n 107, at 267-270; see also O Simic "Rethinking Sexual Exploitation in UN Peacekeeping Operations" (2009) 32 *Women's Studies International Forum* 288 at 291.
[152] Otto "Making Sense of Zero-Tolerance Policies in Peacekeeping Sexual Economies", above n 107, at 26.
[153] Simic *Regulation of Sexual Conduct in UN Peacekeeping Operations,* above n 6.
[154] See generally *Security Council Resolution 1035* SC Res S/Res/1035 (1995).
[155] Simic *Regulation of Sexual Conduct in UN Peacekeeping Operations,* above n 6, at 90.
[156] At 90.
[157] At 110.

for entering into these relationships did not refer to financial or material benefits, but instead for "love, attraction and friendship".[158]

When asked about the "inherent unequal power" between peacekeepers and local women, the majority of those interviewed believed that there was a power imbalance; but suggested that this was based on the legal immunities peacekeepers enjoyed rather than trust within their personal relationships.[159] Thus, where interviewees suggested there was unequal power dynamics it was not based on money or gender, but rather described in legal terms.[160] Differences in power dynamics were also described in other ways, such as education and age,[161] which are arguably present in many adult relationships, not just those between peacekeepers and local women. Nevertheless, the interviewees did not believe that these power imbalances flowed through to their sexual interactions.[162] Therefore, Simic's research exposes that relationships between peacekeepers and beneficiaries of assistance are not always about the "vulnerable" local woman or girl being exploited for sexual purposes, although gifts may be exchanged and a power imbalance may be present.

All of Simic's interviewees were over the age of 18 years, all had "good jobs" and were "happy with their salaries", ruling out any financial motivations for their relationships.[163] As previously argued, the zero-tolerance policy, particularly sexual exploitation, is intended to address a particular group of local people – those engaged or tempted to engage in survival sex. Women more likely to engage in survival sex are those living below the poverty line, without long-term economic opportunities, or who are dependent on receiving aid from UN

[158] At 111 and 113.
[159] At 114.
[160] At 118.
[161] At 114.
[162] At 119.
[163] At 110.

and related humanitarian agencies.[164] Women who are internally displaced are also more likely to engage in survival-sex-type relationships.[165] Moreover, a vast majority of reported allegations of survival sex concern girls under the age of 18, typically between the ages of 13 and 17 years old.[166] Arguably, to engage with these women and girls and question them about what they believe is "sexually exploitative" conduct would be more valuable as an insight into the applicability of the S-G Bulletin's definition of sexual exploitation as they are the group which the S-G Bulletin's definition targets. Simic's research did not take these women and girls into account. However, similar qualitative research commissioned by the Office of Internal Oversight Services in Haiti does engage with such women.

The 2014 study interviewed over 200 Haitians (mostly women) who engaged in transactional sex with UN peacekeepers about their relationships.[167] The study revealed a range of transactional interactions including single exchanges, continuing relationships and relationships described by some as "dating".[168] Interviewees who were deemed "very poor"[169] and/or lived in rural areas cited money, food, medication or other kinds of assistance that peacekeepers had access to as the most valued items in exchange for sex.[170] Whereas those who attended school and/or were from urban or suburban areas noted they received "gifts" in exchange for sex (such as payment of school fees, school books, and cell phones)

[164] Awori et al, above n 23, at 6; Human Rights Watch "*The Power These Men Have Over Us" Sexual Exploitation and Abuse by African Union Forces in Somalia* (2014) at 21-24; Vojdik, above n 135, at 162.
[165] A Harrington "Prostituting Peace: The Impact of Sending State's Legal Regimes on UN Peacekeeper Behaviour and Suggestions to Protect the Populations Peacekeepers Guard" (2007-2008) 17 *Transnational Law and Policy* 217 at 225.
[166] See *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* (2012), above n 56, at [12]; also the two OIOS investigations reports *Report of the Office of Internal Oversight Services on the Investigation into Sexual Exploitation and Abuse by aid workers in West Africa,* above n 58 and *Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organisation Mission in the Democratic Republic of the Congo,* above n 70.
[167] Kolbe, above n 150, at 4, although the majority of individuals interviewed were women, some men and transgendered individuals were included in the study, see at 8.
[168] Kolbe, Above n 150, at 8.
[169] An interviewee was deemed "very poor" under the study if their household generated an income of less than $800 (US), see Kolbe, above n 150, at 7.
[170] Kolbe, above n 150, at 9-11.

and were more likely to describe these exchanges within the concept of "dating" (but distinguished from romantic relationships).[171] In both categories the transactional sex was linked to tangible goods or services related to survival, but with differing levels of negotiating power and consent. Where some interviewees expressed desperation for money or assistance as a "triggering" driving force, others believed they could call the exchange off whenever they pleased.[172] None of these individuals were asked whether they thought these exchanges or relationships were exploitative. When asked about the zero-tolerance policy (in the very few cases where sexual abuse had occurred), many did not know about the policy or how to make a complaint.[173]

Under the zero-tolerance policy all these relationships would be considered sexual exploitation because of their transactional nature. Therefore, the broad definition of sexual exploitation utilised by the UN codes of conduct and the Bulletin have the potential to prohibit many kinds of relationships ie consensual and mutually beneficial adult relationships. Moreover, the blanket inclusion of transactional sex disregards the varied types of sex work/relationships that may exist, and the motivations behind them.

It has been acknowledged by UN officials[174] that local women and girls have different reasons for entering into relationships with peacekeepers that are not always related to survival. In its original report concerning West African aid workers in 2002, the Office of Internal Oversight Services observed the following:[175]

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[171] At 9, 12 and 14.
[172] At 9-11; similar findings were made in a study located in Liberia see B Beber, M J Gilligan, J Guardado and S Karim *Peacekeeping, International Norms, and Transactional Sex in Monrovia, Liberia* (New York University, 2012) available online <www.nyu.edu>. See also Jennings "Service, sex, and Security: Gendered Peacekeeping Economies in Liberia and the Democratic Republic of the Congo", above n 150, at 319.
[173] Kolbe, above n 150, at 17-18.
[174] See *Report of the Office of Internal Oversight Services on the Investigation into Sexual Exploitation and Abuse by aid workers in West Africa*, above n 58, at [11].
[175] [emphasis added] *Report of the Office of Internal Oversight Services on the Investigation into Sexual Exploitation and Abuse by aid workers in West Africa*, above n 58, at [11].

> Such relationships are entered into for a variety of reasons, including the situation where a female refugee does so in the expectation or hope that she may be rewarded with additional goods and services beyond what she would normally be entitled to receive. *This is not to suggest that a number of these relationships are not genuine and may result in marriages.*

Here the OIOS was careful not to colour all sexual relationships as survival-sex-type situations or prostitution. Nevertheless, the fact that this was recognised in a final sentence of a paragraph (and investigation) that focussed on survival sex gives the impression that the majority of relationships are entered into for financial or material purposes. In turn, the majority of peacekeepers are assumed to exploit these circumstances for sexual purposes.

As sexual exploitation arguably labels all women and girls as potential victims, a related criticism alluded to above is that women are denied agency in sexual matters, particularly the ability to negotiate terms of an exchange. Feminist legal theorists such as Dianne Otto and Jena McGill argue that the zero-tolerance policy fails to consider the legitimacy of survival sex.[176] Although it is not the intention of this paper to explore whether prostitution is prima facie exploitative,[177] it is important to note the particular arguments put forward in respect of survival sex as legitimate sex work. Survival sex is "legitimate" in this context due to the socio-economic pressures that exist in conflict and post-conflict states which lead women and girls to look for pecuniary opportunities.

[176] See Otto "Making Sense of Zero-Tolerance Policies in Peacekeeping Sexual Economies", above n 107; McGill, above n 133; see also Harrington (2010), above n 9; Jennings "Service, sex, and Security: Gendered Peacekeeping Economies in Liberia and the Democratic Republic of the Congo", above n 150.
[177] For examples of this debate see D Leidholt "Prostitution: A Violation of Women's Human Rights" (1993-1994) 1 *Cardozo Women's Law Journal* 133; K Green "Prostitution, Exploitation and Taboo" (1989) 64 *Philosophy* 525.

Otto describes survival sex as "a form of livelihood for the "vulnerable" participant and, often, through a web of obligations, for members of their extended family as well".[178] Therefore, young women are more likely to seek out these kinds of relationships to generate small amounts of money or food for themselves and/or their family. Often in post-conflict states there are few economic opportunities, especially for women.[179] As a result, male relatives will relocate for work or military purposes. Thus, family survival will often depend on the women finding work, collecting aid packages and so on.[180] Accordingly, these women are not "victims", but survivors, making calculated decisions based on their cultural or social role in the family/community and the surrounding situation of poverty.[181] Such decision-making and strategies are thus weakened severely by the Bulletin's definition of sexual exploitation.[182]

Although there have been some examples of women and girls turning down sex when it is clear they will receive nothing in exchange,[183] I assert that arguments such as Otto's overestimate the ability of some local women to negotiate terms of an exchange or exercise true agency. It has been noted that some women do not have the power to negotiate when entering into survival-sex-type relationships, or feel they have no choice.[184] Moreover, when taking the post-conflict context into consideration it is difficult to argue that all women have the legitimate freedom of choice. Arguably, where peacekeepers take advantage of this context of desperation for sexual purposes, by withholding assistance owed for example,

[178] Otto "Making Sense of Zero-Tolerance Policies in Peacekeeping Sexual Economies", above n 107, at 260.
[179] Patel and Tripodi, above n 100, at 588; McGill, above n 133, at 6.
[180] McGill, above n 133, at 7.
[181] Otto "Making Sense of Zero-Tolerance Policies in Peacekeeping Sexual Economies", above n 107, at 266; McGill, above n 133, at 30.
[182] Otto "Making Sense of Zero-Tolerance Policies in Peacekeeping Sexual Economies", above n 107, at 273.
[183] For example, see *Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organisation Mission in the Democratic Republic of the Congo*, above n 70, at [14] Case B; see also Kolbe, above n 150, at 9.
[184] K M Jennings "Unintended Consequences of Intimacy: Political Economies of Peacekeeping and Sex Tourism" (2010) 17 *International Peacekeeping* 229 at 234; Kolbe, above n 150, at 11.

then it is rightly classified as exploitation.[185] Moreover, Otto's assumption that these women are exercising agency in their "choice" to engage in transactional sex oversimplifies the reality of such relationships (just as the "women-as-victims" rhetoric oversimplifies them). It's not about agency, it's about survival.

Generally, there will inevitably be a vast spectrum of relationships that exist between mutually beneficial adult relationships on the one hand and coercive, exploitative relationships on the other. Some survival-sex-type relationships may exist in the grey area between. The 2014 qualitative study in Haiti explored above illustrates this spectrum. As noted above, interviewees who were very poor and/or living in rural areas entered into survival-sex-type relationships for money or items of assistance to which peacekeepers had access and felt they had little choice.[186] Conversely, others had creative methods to demonstrate their power of negotiation and agency, for example one interviewee stole and held onto a peacekeeper's identity badge until she was given what he had promised her.[187] Other respondents felt like they "owed sex" to peacekeepers who provided them with material goods.[188] One interviewee noted:[189]

> If you say no to a man like that, with power, a foreigner, he will just take it anyway. You don't have the right to say no. I can't say it was rape. It wasn't rape.

The differential power between peacekeepers (as foreigners with access to money and assistance) was a barrier to the exercise of agency for some women. Furthermore, traditional gender roles also play a part in such interactions. The social or cultural inequalities between

[185] Spencer, above n 138, at 171.
[186] Kolbe, above n 150, at 6-7.
[187] At 10.
[188] At 11.
[189] At 11.

men and women that exist (both in the host state and within military units) are elements that form the broader context of the transactional sex, to which the zero-tolerance policy has failed to draw attention. Sex is labelled as harmful and women as inherently vulnerable to its harm, rather than the context in which the sex occurs.[190]

Part of that context is the gendered nature of peacekeeping operations, the economies it creates and harmful masculinities associated with militaries. Despite gender mainstreaming programmes, UN peacekeeping personnel are overwhelmingly male.[191] Additionally, peacekeeping economies (the economies that inevitably spring up in the areas in which peacekeepers work) involve work primarily associated with women, such as food services and sex work.[192] Straightaway there is a gender divide. Traditional gender roles tend to follow, along with any negative gendered stereotypes that previously existed within the host state, but also the cultural/social backgrounds of foreign personnel.[193] The added presence of a hyper-masculine community (especially those that favour harmful performance of masculinity characterised by antagonism, heterosexual norms, and dominance over the "feminine") within the military can compound discrimination against women.[194] Women are thus more likely to be de-humanised, hyper-sexualised, and the subject of male aggression.[195] A culture favouring harmful kinds of masculinities can also foster a "boys will be boys" attitude and a reluctance to report sexual misconduct or enforce standards.[196] Overall, the social and cultural structures (within peacekeeping and the host state) that foster

[190] At 20.
[191] Current statistics on gender diversity in peacekeeping can be found online <www.un.org> (however, the official stats only portray numbers for male and female, other genders are not represented).
[192] Jennings "Service, sex, and Security: Gendered Peacekeeping Economies in Liberia and the Democratic Republic of the Congo", above n 150, at 315.
[193] Awori et al., above n 23, at 6-7; Puechguirbal "Peacekeeping" in Shepherd (ed) *Gender Matters: A Feminist Introduction to International Relations* (Taylor and Francis, Hoboken, 2014) at 256.
[194] McGill, above n 133, at 24; Kronsell, *Gender, Sex, and the Postnational Defense*, above n 133, at 55.
[195] Awori et al., above n 23, at 6-7; McGill, above n 133, at 24.
[196] Martin, above n 83, at 5; Awori et al., above n 23, at 7.

discrimination against women, and thus a driving force for transactional sex and sexual abuse, have not been dealt with by the UN's zero-tolerance policy.

Another contextual element that may exist behind transactional or survival sex is extreme poverty. Scholars like Otto and McGill argue that the underlying socio-economic context that can lead young women into survival-sex-type relationships has not been dealt with by the zero-tolerance policy. Due to conflict or disaster, host states may have very limited employment opportunities, particularly for women who may suffer from gender, race or class-based inequalities.[197] Therefore, transactional or survival sex are among the very few options available for some women to provide for their livelihood. The UN has yet to tackle the context of poverty, or racial and gender inequalities underlining that poverty, that might be a driving force for transactional sex or sexual abuse. Consequently, the UN has been accused of looking out for the interests of itself as an institution and its reputation rather than demonstrate any real concern for victims of sexual exploitation and abuse in the peacekeeping context.[198]

Some UN reports have acknowledged the pressing socio-economic problems underlying peacekeeping mission areas. The OIOS 2002 investigation report observed that many reasons young women and girls in West African refugee camps entered into such relationships were connected with poverty and lack of real employment opportunities for women:[199]

[197] McGill, above n 133, at 26; Secretary-General *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* GA A/68/756 (2014) at [37]; See also E G Ferris "Abuse of Power: Sexual Exploitation of Refugee Women and Girls" (2007) 32 *SIGNS* 584.
[198] M Lipson "Peacekeeping: Organised Hypocrisy?" (2007) 13 *European Journal of International Relations* 5, at 17-18; McGill, above n 133, at 33.
[199] *Report of the Office of Internal Oversight Services on the Investigation into Sexual Exploitation and Abuse by aid workers in West Africa*, above n 58, at [12].

> The Investigation Team discovered that many female refugees engage in relationships because of abject poverty pervading the refugee camps in which they live. In the absence of skills training and employment, many are compelled to enter into prostitution or other forms of exploitative relationships to augment the inadequate aid provided for their basic needs of food, clothing and shelter.

Again, the UN expert report leaked in 2015 clearly linked transactional sex to the context of poverty, highlighting that for some women sex work may be the only means of obtaining food or money.[200] Similarly in 2015, the OIOS noted once again that poverty was a driving force of survival-sex-type relationships and prostitution.[201] However, despite subsequent recognition of factors that can lead women and girls into survival-sex-type relationships with peacekeepers, the zero-tolerance policy itself takes no account of this context.

As the feminist legal theorists have correctly suggested,[202] the zero-tolerance policy colours all local women as victims. Arguably, this may be based on the concept of the western or imperial peacekeeper with disposable income taking advantage of vulnerable local women.[203] Another interpretation is the developed state versus developing state scenario; ie peacekeepers representing the developed states that can take advantage of the vulnerability of developing nations.[204] However, the reality of modern peacekeeping runs counter to this assumption; for example, the top ten contributing countries are all developing states.[205]

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[200] Awori et al, above n 23, at 6.
[201] Office of Internal Oversight Services *Evaluation Report: Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations* (May 2015) at [47].
[202] Simic "Rethinking Sexual Exploitation in UN Peacekeeping Operations", above n 151; Otto "Making Sense of Zero-Tolerance Policies in Peacekeeping Sexual Economies", above n 107; Harrington (2010), above n 9.
[203] See generally R Kapur "The Tragedy of Victimisation Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics" (2002) 15 *Harvard Human Rights Journal* 1 at 11-12.
[204] C Schellhaas and A Seegers "Peacebuilding: Imperialism's New Disguise?" (2009) 18 *African Security Review* 1 at 6-7.
[205] The top ten TCCs of military and police contingent members are the following; Pakistan, India, Bangladesh, Ethiopia, Nigeria, Rwanda, Nepal, Jordan, Egypt and Ghana see Department of Peacekeeping Operations,

Moreover, some host states have not been developing countries, for example, Bosnia. The rhetoric of women as inherently vulnerable or victimised can also support further discrimination against women. Particularly, this rhetoric panders to negative gendered stereotypes that women are passive, helpless and in need of protection.[206] Arguably, the zero-tolerance policy is patronising and runs counter to the UN's wider policy on women's active role in peacebuilding.[207]

The UN's zero-tolerance policy is clearly based on the conservative "women as victims" approach. This is represented in the S-G Bulletin's broad definition of "sexual exploitation". However, there are genuine consensual relationships that do exist and may be unfairly caught under the definition. Moreover, the policy does not consider the spectrum of transactional sex and relationships that may exist between locals and peacekeepers which may have differing levels of agency exercised or power of negotiation. The local population should not be classified generally as inherently vulnerable.

Conversely, there is a similar danger with fully embracing a "women as liberated decision-makers" approach. As was seen above, it is perhaps the context of social and cultural inequalities, and poverty that lead to transactional sex. It is difficult to argue that on the one hand women in such circumstances are acting with their agency and negotiating terms of an exchange for sex with peacekeepers then argue on the other hand that these women are driven into survival sex because of abject poverty. In reality some women may have very little choice or power to negotiate. The approach also fails to consider whether when accepting the exchange in these circumstances peacekeepers are exploiting the desperation

"Ranking of Military and Police Contributions to UN Operations" (August, 2015) available online <https://www.un.org >.

[206] See discussion on this rhetoric above, see also S Milivojevic and S Copic "Victims of Sex Trafficking: Gender, Myths, and Consequences" in S G Shohan, P Knepper and M Kett (eds) *International Handbook of Victimology* (Taylor and Francis, Hoboken, 2010); Puechguirbal, above n 193.

[207] McGill, above n 133, at 32; see also *UN Security Council Resolution 1325*, above n 55.

of these women or not. Moreover, the situation where sex is exchanged for money, food, medicine or other kinds of assistance that peacekeepers have access to and locals are owed is arguably the targeted conduct of "sexual exploitation" and is rarely engaged with in the literature itself.

In summary, the tension between the competing approaches of "women as victims" on one side and "women as liberated decision-makers" on the other expose the lack of attention paid to the wide spectrum of relationships that exist between coerced and voluntary sexual relationships. Both approaches attempt to essentialise women's experience. The UN's blanket prohibition on transactional sex disregards any engagement with the contextual factors that lead locals to sex work generally. The differing levels of agency or power of negotiation are also ignored. Sexual exploitation is about the differential power imbalance between peacekeepers and locals, and the abuse of that power. The line between a consensual relationship or exchange and an exploitative one is not drawn by the definition, and is in fact difficult to draw. The UN has chosen a strong position with a definition of "sexual exploitation" that drives the assumption that all local women are potentially victims. By taking such an extreme position the UN shuts down any engagement with the myriad of reasons behind an individual's decision to participate in transactional sex or survival sex with UN peacekeepers. The definition is much broader than the conduct it intended to target originally; survival sex scenarios.

Both approaches (of "women as victims" on one side and "women as liberated decision-makers" on the other) can be compared with the feminist lens that I apply to this thesis. Feminist theories of anti-essentialism and intersectionality, in which my feminist lens is placed, challenges the dichotomy of "victims" versus "agency" because they both ignore or do not adequately address women's experiences within patterns of systematic power and

oppression.[208] As a starting point, I argue that women should have the ability to exercise their active agency in making decisions relating to their sexual relationships and their bodies. To support a blanket rule against all kinds of transactional sex and label all sex between peacekeepers and local women as inherently harmful may support further discrimination against women. This view places women in a passive role and enforces the continuation of negative gendered stereotypes. Nevertheless, differential power between peacekeepers and locals does exist and cannot be ignored. The unequal power dynamics stem from the context in which peacekeepers operate; typically in post-conflict zones, to provide assistance and stability, protection of civilians and aid for local people. They have access to money, food, and medicine needed for survival where the local population may not. The host state and locals place their trust in peacekeepers to do their job and supply such aid. Moreover, additional power dynamics swing in peacekeepers' favour as they have legal immunity from host state jurisdiction.[209] It is argued therefore that the official definition of "sexual exploitation" under the S-G Bulletin needs to be redrafted or reconceptualised in order to better reflect women's agency, the power to negotiate, and contextual issues, and reflect the targeted conduct more clearly.

As stated in the Introduction, for the purposes of this thesis I am re-conceptualising the definition of "sexual exploitation" to mean survival sex specifically. Although there is a spectrum of possible exchanges between peacekeepers and local people within "survival sex", I am using the most offensive form as the subject of discussion for the remainder of this thesis – where sex is exchanged for aid or assistance to which peacekeepers have access

[208] M A Fineman and R Mykitick *The Public Nature of Private Violence: The Discovery of Domestic Violence* (Routlegde, New York, 1994) at 64; see generally, B Hooks *Feminist Theory: From Margin to Center* (2nd ed, Pluto Press, London, 2000); E Schneider "Feminism and the False Dichotomy of Victimization and Agency" (1993) 38 *New York Law School Review* 387.

[209] Noted by Simic's interviewees as part of the inherent differential power between peacekeepers and the local population, see Simic *Regulation of Sexual Conduct in UN Peacekeeping Operations,* above n 6, at 114.

or which is already owed to the local population. This will include the scenario of a local woman waiting in line for aid and being forced by a peacekeeper to exchange sex for such aid. This will exclude adult prostitution.

CONCLUSION

In this chapter I have argued that essentially, "sexual abuse" and "sexual exploitation", as defined in the S-G Bulletin, are quite different. "Sexual abuse" is unambiguous; it covers conduct that may be considered international crimes or clear examples of violence against women under international human rights law, such as rape and sexual violence. Sexual abuse has an identifiable character and is largely supported by academics. However, "sexual exploitation" is more complicated.

Sexual exploitation as currently defined in the S-G Bulletin captures instances of survival sex and prostitution. The UN has prohibited these relationships as exploitative based on the inherent power imbalance between peacekeepers and beneficiaries of assistance. However, the resulting definition in the S-G Bulletin is arguably broad enough to catch other kinds of relationships, such as consensual relationships. The difference between coerced and voluntary sexual relationships can be important because many international instruments make such distinctions; for example, forced prostitution is an international crime and voluntary adult prostitution is not. For these reasons, the concept of sexual exploitation has been subject of much criticism.

The critics of sexual exploitation expose the tension between two competing approaches ie the conservative "women as victims" on the one hand and the "women as liberated decision-makers" on the other. The critics of sexual exploitation point out that prostitution and survival sex are part of broader contextual issues such as poverty and harmful masculinities that have failed to be dealt with by the UN. Additionally, the zero-tolerance policy disregards

the agency of local women who engage in transactional sex. However, these approaches do little to solve the ambiguous nature of sexual exploitation as neither address the vast spectrum of relationships that exist between coerced/forced and voluntary sexual relationships. Instead, they attempt to essentialise women's experience.

Although the concept of sexual abuse is rather uncomplicated, sexual exploitation is ambiguous, leaving open the possibility of many different kinds of relationships being caught within the S-G Bulletin's definition. The major critics of sexual exploitation and zero-tolerance policies point out that prostitution and survival sex are manifestations of a much wider socio-economic problem that the UN has failed to address. This wider context includes poverty within the host state and harmful masculinities associated with militaries and a "boys will be boys" attitude; these foster a culture of sexual exploitation and a tradition of silence. Overall, the S-G Bulletin definition of sexual exploitation is conceptually flawed and ambiguous

For the purposes of this thesis, the following sexual conduct has been identified; sexual abuse will be assumed to include rape and sexual violence, and sexual activity with children. Sexual exploitation will be considered survival sex – specifically where sex is exchanged for assistance that peacekeepers have access to or are already owed to the local population. I will not consider adult prostitution as sexual exploitation.

PART TWO: SANCTIONS AGAINST TROOP-CONTRIBUTING COUNTRIES

INTRODUCTION TO PART TWO

Part Two will examine the first substantive category of suggested options for increased accountability; sanctions against the troop-contributing country. Despite the raft of institutional reforms undertaken by the UN there remains a general impression that troop-contributing countries are not prosecuting members of national contingents for sexual exploitation and abuse.[1] As a result, some academics have argued the UN should sanction TCCs that fail to exercise their criminal jurisdiction. [2] Such measures against contributing states would "validate the rights of the victims"[3] and better enforce compliance with UN standards.[4] It would also help legitimise the UN's zero-tolerance policy towards sexual exploitation and abuse.

This Part will analyse the following proposition; as troop-contributing states have exclusive criminal jurisdiction then the UN should have the corresponding responsibility to ensure states exercise such jurisdiction. For example, in the event that there are *prima facie* grounds indicating serious misconduct and the TCC fails to hand over the case to the appropriate national authorities for investigation, or further discipline or prosecute an individual

[1] See for instance, Office of Internal Oversight Services *Evaluation Report: Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations* (May 2015) at [25]-[31]; C Ferstman *Special Report: Criminalising Sexual Exploitation and Abuse by Peacekeepers* (United States Institute of Peace , Washington, 2013) at 3.
[2] Including, Z Deen-Racsmary "The Amended UN Model Memorandum of Understanding: A new Initiative for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents?" (2011) *Journal of Conflict and Security Law* 321; Defeis, above n 12; A Harrington "Victims of Peace: Current Abuse Allegations against UN Peacekeepers and the role of the Law in Preventing them in the Future" (2005) 12 *ILSA Journal of International & Comparative Law* 125; V Kent "Peacekeepers as Perpetrators of Abuse" 14 *African Security Review* 85; R Murphy *UN Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues in Practice* (Cambridge University Press, Cambridge, 2007).
[3] Harrington, above n 2, at 148.
[4] Murphy, above n 2, at 303.

peacekeeper for sexual exploitation and abuse the UN should sanction the TCC. For the purposes of this chapter the term "sanctions" is used to convey coercive means of enforcement.[5] Additionally, "sanctions" will be used to include those measures that may be considered non-coercive as well (ie those based on political or moral persuasion). Academic commentators advocating the above proposition[6] have referred to various measures the UN should use in order to compel contributing states to hold their contingent members to account for sexual exploitation and abuse. Such suggested sanctions include making public the names of states which do not exercise criminal jurisdiction to the full extent of their national law,[7] withdrawing national contingents,[8] blacklisting states so they may no longer contribute troops,[9] and even economic sanctions in the most serious cases.[10]

Outside of academic discourse, strong responses to continued impunity caused by contributing states' failure to ensure accountability have been suggested by UN officials and reports.[11] Roberto Ricci, former Head of the Human Rights Section of UN Organization Mission in the Democratic Republic of Congo (MONUC),[12] argued that contributing states should be "held accountable when they don't prosecute people who have been sent home."

[5] The term "sanctions" is typically used in academic discourse to refer to coercive means of enforcement see A Cassese *International Law* (2nd ed, Oxford University Press, Oxford, 2005) at ch 15; see also M Noorthman *Enforcing International Law: From Self-help to Self-contained Regimes* (Ashgate, Burlington, 2005) at 33-35.
[6] See above n 2.
[7] Kent, above n 2, at 90; Murphy, above n 2, at 303.
[8] Harrington, above n 2, at 148.
[9] Deen-Racsmany, above n 2, at 342; Defeis, above n 2, at 209; Harrington, above n 2, at 148; Murphy, above n 2, at 303; Ferstman, above n 2, at 12.
[10] Defeis, above n 12, at 214; Harrington, above n 17, at 148.
[11] See for example *Report of the Group of Legal Experts on Making the Standards contained in the Secretary-General's Bulletin binding on Contingent Members and Standardising the Norms of Conduct so That They Are Applicable to All Categories of Peacekeeping Personnel* GA A/61/645 (2006): [Second Group of Legal Experts Report].
[12] Now known as the "UN Organization Stabilization Mission in the Democratic Republic of Congo" (MONUSCO) see *Security Council Resolution 1925* SC S/RES/1925 (2010).

Furthermore, he suggested a system should be implemented where the UN would actively oversee such prosecutions.[13]

Annual reports released by the Secretary-General on *Special Measures for the Protection from Sexual Exploitation and Sexual Abuse* since 2009 reveal that the SG has become increasingly frustrated with issues relating to accountability and transparency by TCCs. In his 2012 report, the SG used strong language to suggest coercive measures may be necessary in response to contributing states, and their national contingent commanders, that allow continued impunity. The Secretary-General noted that the UN "… will not hesitate to repatriate an entire military or police contingent where it is determined that serious misconduct, particularly sexual exploitation and abuse, has occurred owing to failure by the chain of command".[14] This was reiterated in 2015 where Ban Ki-moon noted "strong sanctions" would be employed against states which continued to allow abuse.[15] Moreover, the Secretary-General further expressed that he would repatriate contingents where there was a "demonstrated pattern of abuse or non-response to allegations of misconduct."[16] Additionally, he noted that he would consider termination of deployment of contingents from particular TCCs where abuse is ignored.[17] Moreover, in March 2016, the Security Council authorised the Secretary-General to remove entire contingents where there were patterns of sexual exploitation and abuse.[18]

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[13] S K Miller "Accountability for Conduct of UN-Mandated Missions under International Human Rights Law: A Case Study concerning the Sexual Abuse of Women in the UN Mission in the Democratic Republic of Congo (MONUC)" in R Arnold and GA Knoops (eds) *Practice and Policies of Modern Peace Support Operations under International Law* (Transnational Publishers, New York, 2006) 261 at 281, footnote 87 and accompanying text.

[14] Report of the Secretary-General *Special Measures for the Protection from Sexual Exploitation and Abuse* GA A/66/699 (2012) at [36]. This was re-emphasised in the 2013 Report, Secretary-General *Special Measures for the Protection from Sexual Exploitation and Abuse* GA A/67/766 (2013) at [35].

[15] Report of the Secretary-General *The Future of United Nations Peace Operations: Implementation of the Recommendations of the High-Level Independent Panel on Peace Operations* GA A/70/357-S/2015/628 (2015) at [120].

[16] At [120].

[17] At [120].

[18] *Security Council Resolution 2272* SC Res S/Res/2272 (2016).

In 2013 the Secretary-General revealed plans to extend the information to be provided in his annual reports to increase transparency, including country-specific data relating to allegations being investigated by contributing states and what sanctions (if any) those states imposed on offenders.[19] Statistics provided by the annual reports are derived from those collected by the Department of Peacekeeping Operations and Department of Field Support.[20] Thus far, official statistics have not named those contributing states connected with allegations. However, in an unprecedented move, the Office of Internal Oversight Services released an evaluation report (2015) which did name states which had received allegations over the period of 2010-2013.[21]

In both 2014 and 2015 the Secretary-General warned that he would name and shame non-compliant states.[22] It remains to be seen whether the Secretary-General will take this next step and name the states in his report or continue to leave them anonymous. Either way, this will be an important step for greater transparency. Further non-coercive measures were suggested in order to strengthen enforcement. Such measures included human rights related pre-screening of personnel on pre-deployment, increasing investigative capabilities in the field and better information sharing between national governments and the investigative arm of the UN, currently the Office of Internal Oversight Services (OIOS).[23] The goal of these proposed changes is to increase TCCs' technical capabilities to hold offenders to account. These developments illustrate a clear intention to introduce mechanisms to aid state compliance.

[19] *Special Measures for the Protection from Sexual Exploitation and Abuse* (2013), above n 14 at [25].
[20] At [13] footnote 5.
[21] *Evaluation Report: Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations,* above n 1, at 14.
[22] Report of the Secretary-General *Special Measures for the Protection from Sexual Exploitation and Abuse GA* A/68/756 (2014) at [33]; *The Future of United Nations Peace Operations,* above n 15, at [122(f)].
[23] *Special Measures for the Protection from Sexual Exploitation and Abuse* (2013), above n 14, at [30], [32]-[34]; *The Future of United Nations Peace Operations,* above n 15, at [124(j)] and [126(k)].

There appears to be inconsistency of opinion in the literature as to when measures, coercive or otherwise, should be imposed on contributing countries. On the one hand, both Elizabeth Defeis and Alexander Harrington argue that coercive measures should be imposed on TCCs that do not "prosecute the abusers to the fullest extent allowed under their legal systems".[24] Zsuzsanna Deen-Racsmany mentions blacklisting states as a response to TCCs which are "systematically unwilling or unable to prosecute or cooperate in any relevant way".[25] This aligns with the Zeid Report and the recent reports from the Secretary-General.[26]

To implement measures against a state there should be evidence of international responsibility through a breach of an obligation. Legal obligations can arise from a number of sources; such as international agreements, treaties or customary international law. There is currently a lack of certainty regarding what obligations exist for troop-contributing countries to criminalise, investigate and prosecute sexual exploitation and abuse, and where such obligations would arise.

The overall goal of Part Two is to examine the option of these enforcement measures, analyse possible legal foundations, and assess options in light of the three principles I highlighted in Part One; justice being seen to be done, host state ownership and UN leadership. Thus, it is necessary to consider when such sanctions should be used and on what legal basis. As noted by Frederic Dopagne, "a sanction presupposes a previous wrongful act".[27] Furthermore, for academics and official UN reports to suggest or recommend sanctions assumes that certain obligations to investigate and prosecute for sexual exploitation and abuse exist. For a state to be held responsible for its international wrongful

[24] Harrington, above n 2, at 148; Defeis, above n 2, at 209.
[25] Deen-Racsmany, above n 2, at 342.
[26] Secretary-General *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations* GA A/59/710 (2005) prepared by Prince Zeid Ra'ad Zeid Al-Hussein: [Zeid Report] at [82]; *The Future of United Nations Peace Operations*, above n 15, at [120].
[27] F Dopagne "Sanctions and Countermeasures by International Organisations" in R Collins and N White (eds) *International Organisations and the Idea of Autonomy* (Routledge, New York, 2011) 178 at 180.

acts the principles of state responsibility dictate that there must first be a violation of an obligation owed by the state in question.[28] This is particularly true for coercive measures, such as economic sanctions.

In this Part I will examine different sources of international law for state obligations to criminalise, investigate, prosecute and punish acts of sexual exploitation and abuse committed by military contingent personnel. The primary sources I will look at include the agreements with the UN, particularly the Memorandum of Understanding (MOU), the agreement between the UN and the TCC, and question whether treaty law applies. In addition, I will examine principles of international human rights law for obligations that may arise independently from the MOU. Having explored the substantive rights and obligations that may apply, I will consider the measures which the UN might employ to enforce those obligations and discuss which organ of the UN has the power to impose such measures.

I address these issues across chapters three, four and five. In Chapter Three I will examine the agreements concluded with the UN; the Status-of-Forces Agreement[29] (between the UN and the host state) and the Memorandum of Understanding (between the UN and the TCC). These two documents are important because they reflect the terms which states have agreed in regard to criminal jurisdiction and immunities and also explore what the UN expects from states, in particular the TCCs. There are significant grey areas that will be addressed, primarily issues relating to legal status and lack of clarity regarding the rights and duties of states to investigate and prosecute for sexual exploitation and abuse.

Chapter Four will consider relevant international human rights law to support the idea of sanctioning the TCC. It will examine such norms for evidence of duties on states to

[28] *Responsibility of States for Internationally Wrongful Acts* GA Res A/Res/56/83 (2001) art 2.
[29] *Model Status of Forces Agreement between the United Nations and Host Countries* GA A/45/594 (1990): [Model SOFA].

criminalise, investigate, prosecute and punish offences that could be considered "sexual abuse" or "sexual exploitation". Examples of relevant positive duties may be found in human rights treaties, such as the *Convention on the Elimination of All Forms of Discrimination against Women.*[30]

The fifth chapter will consider the use of sanctions (withdrawing troops, blacklisting states, naming and shaming states) as a means to deliver or enforce the rights and obligations discussed in chapters three and four. I will also discuss which organ of the UN would most likely implement such measures. Additionally, I will be assessing the coercive and non-coercive enforcement measures in light of my three underlying principles of justice being seen to be done, host state ownership and UN leadership.

These chapters will be followed by the conclusions to Part Two which will pull together the main arguments.

[30]1249 UNTS 13 (opened for signatures 18 December 1979, entered into force 3 September 1981): [CEDAW].

CHAPTER THREE: AGREEMENTS WITH THE UNITED NATIONS

INTRODUCTION

The two primary instruments that contribute to the legal framework of peacekeeping operations are the Status-of-Forces Agreements (between the UN and the host state) and the Memorandum of Understanding (between the UN and the TCC). They both govern the jurisdiction of states and immunity of UN personnel. The current version of the UN-Model Memorandum of Understanding provides the most detailed provisions governing investigation and accountability requirements on behalf of TCCs and is therefore the most relevant. The first issue to consider is the legal status of the MOU. If the MOU is considered a bilateral treaty, then aspects of treaty law may apply. There are particular consequences that attach to breaching treaty obligations independent from the rules of state responsibility, such as the termination of the treaty. Terminating the MOU would naturally result in the withdrawal of troops. Additionally, if the MOU is a treaty then its provisions regarding the exercise of criminal jurisdiction may have cogent normative value. The MOU may also be legally binding without being a treaty and thus certain sanctions may flow from breach outside of the particulars of treaty law. As a general rule however, it has been understood by some legal academics that MOUs are not legally binding instruments under international law.[31] Commentary on the UN-TCC MOU in particular has been conflicting on this issue.[32]

[31] For example, A Aust *Modern Treaty Law and Practice* (2nd ed, Cambridge University Press, Cambridge, 2007).
[32] See discussion below, (B) Legal Status.

There appears to be further difficulties associated with the implementation of the UN codes of conduct[33] and the Secretary-General's *Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abu*se.[34] Although it was originally recommended in a number of official reports that the MOU should have all these documents annexed,[35] only one document made it to the final draft (an amalgamation of the two UN Codes).[36] Moreover, it is unclear what legal status the annexes have in relation to the MOU. Nevertheless, the zero-tolerance policy may have been incorporated in other ways, for example, there are many references to the terms "serious misconduct", "sexual exploitation" and "sexual abuse". The definitions of these terms are also annexed to the agreement.

Determining the status of the MOU leads to the next issue of what terms TCCs have agreed to be bound by and whether these involve obligations to exercise criminal jurisdiction? There are several stages to the "exercise of criminal jurisdiction" by troop-contributing states in response to serious misconduct (including sexual exploitation and abuse) by members of their military forces. Investigation and accountability for serious misconduct are covered at length by the MOU as amended in 2007.[37] When an allegation of sexual exploitation and abuse is made, the UN (through the OIOS) may undertake a preliminary investigation where it has *prima facie* grounds suggesting that serious misconduct has taken place.[38] This is

[33] UN Conduct and Discipline Unit *Ten Rules: Code of Personal Conduct for Blue Helmets* <http://cdu.unlb.org> and UN Conduct and Discipline Unit *We are United Nations Peacekeeping Personnel* <http://cdu.unlb.org>.
[34] UN Secretary-General's Bulletin *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, UN Secretariat ST/SGB/2003/13 (9 October 2003): [S-G Bulletin 2003].
[35] Zeid Report, above n 26, at [25]; Second Group of Legal Experts Report, above n 11, at [6]; see also a copy of the previous draft *Revised Draft Model Memorandum of Understanding between United Nations and [participating state] Contributing Resources to [the United Nations Peacekeeping Operation]* GA A/61/494 (2006).
[36] 2007 MOU, below n 37, Annex H *We are United Nations Peacekeepers.*
[37] *Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual)* GA A/c.5/66/8 (2011) ch. 9 Memorandum of Understanding: [2007 MOU].
[38] The UN also must notify the national government immediately see 2007 MOU, above n 37, art 7 *quater* [7.11]. The national government has the responsibility to undertake its own investigation where it has prima facie grounds indicating serious misconduct see art 7 *quater* [7.11].

limited to an administrative investigation, the gathering and holding of information about the complaint (this is a by-the-papers investigation that does not include the interviewing of witnesses).[39] The responsibility of a formal criminal investigation is then handed over to the relevant national government.[40] The Office of Internal Oversight Services has no capacity to undertake criminal investigations. Upon the outcome of an investigation it is expected that the TCC will hand the case over to the appropriate national authorities for a decision as to whether or not the accused will be disciplined and/or prosecuted.[41] Additionally, the troop-contributing country is expected to report back to the UN regarding the outcome of the case.[42]

The above outlines a clearly delineated process for investigating serious misconduct allegations made against members of military personnel. In reality however there may be more of a combined effort between the investigative arm of the UN and the national government.[43] The process of cooperative investigation will be further explored in Chapter Eight: A Special Court for Peacekeepers. However, for the purposes of this chapter, the above outline serves as a useful yardstick by which to examine particular issues related to the TCC's exercise of its criminal jurisdiction. The expected cooperation between the UN and the TCC at the investigative stage adds a layer of complexity to the question of UN enforcement measures against the contributing country. A particular issue relevant to this chapter's subject matter is whether an "assurance" that the TCC will exercise jurisdiction assumes that all these steps be taken. It may be that sanctioning for an omission at certain stages may have more of a legal basis or at least have more of a legitimate footing than others. For example, a sanction for failure to initiate a formal investigation may have more

[39] Above n 37 Annex F at [30] meaning of "Preliminary fact-finding inquiry" and at art 7 *quater* [7.12].
[40] 2007 MOU, above n 37, at art 7 *quater* [7.12].
[41] At art *sexiens* [7.24].
[42] At art *sexiens* [7.24].
[43] In particular see 2007 MOU, above n 37, arts 7 *quarter*, 7 *sexiens* and 7 *quinquiens*.

credibility than sanctioning upon a failure to prosecute. This comes down to the issue of state sovereignty – it may be the case that the UN simply cannot compel contributing states to prosecute via an agreement as that decision is clearly one of sovereignty and prosecutorial discretion.[44] However, omitting to execute other stages, such as submitting the case to the relevant national authorities, could be a breach of the MOU and therefore such sanctions could be at least arguable on that basis.[45] The UN however has placed more emphasis on the reporting requirements and these will also be discussed.

It is important to note at the outset that there are minimal references to the host state in the Model MOU. Moreover, there is absolute silence on the role of victims, their rights, or the impact of sexual exploitation and abuse on victims themselves, their communities or the host state. This chapter will argue that the MOU should be interpreted as a treaty and will explore its provisions in detail, particularly those which may obligate TCCs to positively respond to sexual exploitation and abuse by military contingent members. This chapter will highlight that the MOU does not allow for host state ownership, or any kind of inclusivity, and that there is little room for the UN to take leadership.

(1) JURISDICTION

From the inception of the United Nations Emergency Force I (UNEF I)[46] in 1956 (established to help end to the Suez Crisis), troop-contributing countries have received the benefit of exclusive criminal jurisdiction over members of their national military contingents in UN peacekeeping operations.[47] The purpose of this policy was to encourage member states to contribute troops from their military forces without the fear of being subjected to

[44] Zeid Report, above n 26, at [80].
[45] Based on the arguable case that the MOU is meant to be a treaty.
[46] *General Assembly Resolution* GA Res A/Res/998 (ES-I) (1956); *General Assembly Resolution* GA Res A/Res/1000 (ES-I) (1956); *General Assembly Resolution* GA Res A/Res/1001 (ES-I) (1956).
[47] M Odello "Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers" (2010) 15 *Journal of Conflict & Security Law* 347 at 366.

foreign jurisdiction for crimes committed while on mission. Specifically, there was concern that TCC's military personnel may be tried in a possibly defective legal system, perhaps without procedural safeguards in relation to evidence collection or relevant civil rights.[48] Immunity from host state jurisdiction provides important protection for foreign military forces so they can perform their official functions without interference.[49] Additionally, granting exclusive criminal jurisdiction to the contributing country supports the practice of sovereign immunity.[50] The discipline or criminal punishment of members of military forces in particular is often considered a special matter of sovereignty for the sending state.[51]

Generally, customary international law dictates that states are not permitted to proscribe or exercise their jurisdiction unless it can be supported by certain jurisdictional principles.[52] Jurisdiction over criminal conduct is primarily based on the "territoriality principle" where a state establishes jurisdiction on the basis that the crime has been committed within the state's own territory.[53] In the peacekeeping context, this would mean that the host state would usually have jurisdiction over criminal offences committed by peacekeeping personnel based on the territoriality principle. However, under the Status-of-Forces agreement (SOFA) between the host state and the United Nations, the host state essentially

[48] Such as a right to lawyer or a fair trial see Odello, above n 47, at 366; Dag Hammarskjold *Summary Study of the Experience Derived from the Establishment and Operation of the Force: Report of the Secretary-General* GA A/3943 XIII (1958) at [136].
[49] D Fleck "Introduction" in D Fleck (ed) *The Handbook of The Law of Visiting States* (Oxford University Press, Oxford, 2001) at 5.
[50] See generally D Fleck "Securing Status and Protection of Peacekeepers" in R Arnold and G A Knoops (eds) *Practice and Policies of Modern Peace Support Operations under International Law* (Transnational Publishers, New York, 2006) 141. See also F Akada "The Enforcement of Military Justice and Discipline in External Military Operations: Exploring the Fault Lines" (2008) 47 *Military Law and the Law of War Review* 253 at 262; G Simm "International Law as a Regulatory Framework for Sexual Crimes committed by Peacekeepers" (2012) 16 *Journal of Conflict & Security Law* 473 at 501; Odello, above n 47, at 376.
[51] Zeid Report, above n 26, at [80].
[52] C Ryngaert *Jurisdiction in International Law* (Oxford University Press, Oxford, 2008) at 21.
[53] G Simm *Sex in Peace Operations* (Cambridge University Press, Cambridge, 2013) at 56.

waives their jurisdiction in regards to military contingent members, confirming their immunity.[54]

For sending/troop contributing state criminal law to apply abroad, extraterritorial jurisdiction must first be prescribed in a state's domestic laws. For the troop-contributing country, jurisdiction over crimes committed extraterritorially may be prescribed on the basis of other principles of jurisdiction; the most relevant principle is that of "active personality". States may prescribe jurisdiction over offences committed outside their territory on the basis that the offender is a national.[55] It is not enough to proscribe extraterritorial jurisdiction, the state must also make the necessary changes to domestic law to allow for law enforcement jurisdiction or adjudication through national courts.[56]

Immunity from host state jurisdiction is not an excuse for impunity; therefore, it is expected that the TCC exercise their jurisdiction.[57] As the Secretary-General (SG) noted in his report on the operation of UNEF I:[58]

> It was important that this waiving of jurisdiction by the host state should not result in a jurisdictional vacuum, in which a given offence might be subject to prosecution by neither the host state nor the participating state.

The Secretary-General acknowledged the risk that troop-contributing countries may not seriously consider allegations and investigate their members of national contingents or

[54] The agreement between the UN and the host state, see Model SOFA, above n 29.
[55] Ryngaert, above n 52, at 88.
[56] For the most part, the ability to enforce the jurisdiction is implied by its proscription over particular conduct see N Boister *An Introduction to Transnational Criminal Law* (OUP Oxford, Oxford, 2012) at 136.
[57] Defeis, above n 2, at 208.
[58] *Summary Study of the Experience Derived from the Establishment and Operation of the Force: Report of the Secretary-General*, above n 48, at [136].

ultimately punish offenders.[59] This risk is meant to be offset by obtaining a formal assurance from the TCC that they will exercise criminal jurisdiction:[60]

> The military contingent immunity from host state jurisdiction ... is based on the understanding that the troop-contributing country would exercise such jurisdiction as might be necessary with respect to crimes or offences committed in the host state. Therefore, assurances were sought from the troop-contributing country for this reason.

The assurance that the contributing state will exercise its criminal jurisdiction is dependent on whether the conduct in question (for the purposes of this thesis; sexual exploitation and abuse) is firstly criminalised under their national law and secondly, whether extraterritorial jurisdiction has been prescribed, and the necessary changes have been made to allow for law enforcement.

(2) Status-of-Forces-Agreements

Status-of-Forces Agreements (between the UN and the host state) set out the privileges and immunities to be enjoyed by UN personnel when they enter the host state and execute their operational duties as mandated by the UN Security Council. The agreements also govern other concerns, such as liabilities for civil claims,[61] use of uniforms and arms,[62] transportation,[63] and the settlement of disputes.[64] The relevant provision in terms of criminal jurisdiction over military contingent members is art 47(b):

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[59] At [136].
[60] At [136].
[61] Model SOFA, above n 29, art 49.
[62] At art 37.
[63] At arts 12-14.
[64] See part VII.

> Military members of the military component of the United Nations Peacekeeping Operation shall be subject to the exclusive jurisdiction of their respective participating states in respect of any criminal offences which may be committed by them in [host country].

This provision reinforces the doctrine of sovereign immunity; it also makes clear that the host state waives its criminal jurisdiction over such personnel.[65] The host state is however relying heavily on the troop-contributing country to exercise its criminal jurisdiction. The provisions go on to state in art 48 that:[66]

> The Secretary-General of the United Nations will obtain assurances from the Government of participating States that they will be prepared to exercise jurisdiction with respect to crimes or offences which may be committed by members of their national contingents serving with the peacekeeping operation.

Additionally, the footnote to art 48 states:[67]

> Upon conclusion of a specific agreement, the provision in question could instead be inserted in a memorandum of understanding where further clarifications on the terms of an agreement are usually provided.

There are a couple of points that may be deduced from the two provisions and footnote. Firstly, troop-contributing countries retain exclusive criminal jurisdiction on the understanding they will indeed exercise it. The SOFA dictates that the Secretary-General is

[65] Compare to the practice under NATO status-of-forces agreements where the host state still retains secondary jurisdiction should the TCC fail to exercise criminal jurisdiction (further discussed in Chapter Six: Host State Jurisdiction) see R Opie "Human Rights Violations by Peacekeepers: Finding a Framework for Attribution of Responsibility" (2006) *New Zealand Law Review* 1 at 24.
[66] Model SOFA, above n 29, art 48.
[67] At art 48 footnote h.

to ensure this by obtaining formal assurances from each TCC to this end – this is required (as opposed to being merely optional) by art 48. Secondly, the footnote of art 48 suggests that assurances could be inserted in the Memorandum of Understanding as part of the usual terms of that agreement.

Status-of-Forces Agreements have been concluded in one way or another since United Nations Emergency Force in 1956.[68] The UN Model SOFA was drafted in 1991 to facilitate negotiation of such agreements based on past state practice.[69] Where a SOFA has not been concluded before the commencement of a particular mission, the Security Council has on such occasions stated that the Model SOFA will apply in the interim.[70] This continued state practice has brought about much scholarship on the legal status of the Model SOFA. Some academics[71] have debated the extent to which the Model SOFA now represents customary international law. If it were the case that the Model SOFA represents custom, then the requirement of a formal assurance is more cogent. As will be seen below, between 1997 and 2007 the Model MOU did not contain a provision on assurances and there had also been a lack of state practice in providing them. Whether during that time the TCC or the UN were breaching a requirement of custom falls outside the scope of this thesis, however, for current purposes it is sufficient to note that the SOFA and its legal status has received a lot of scholarly attention. Interestingly, there is a gap in the literature on the Model MOU and its precise legal status which is unexpected since it is the partner agreement to the Model SOFA.[72]

[68] See Deen-Racsmany, above n 2, at 329.
[69] For example see *Security Council Resolution 1528* SC Res S/Res/1528 (2004) at [9]; *Security Council Resolution 1542* SC Res S/Res/1542 (2004) at [11].
[70] Deen-Racsmany, above n 2, at 326.
[71] For example D Fleck and M Saalfeld "Combining Efforts to Improve the Legal Status of UN Peacekeeping Forces and their Effective Protection" (1994) *International Peacekeeping* 82.
[72] For example, as noted in the Model SOFA, above n 29, art 48 footnote h – "further clarifications" on the terms of the agreement are provided in the MOU, clearly linking the Model SOFA together with these agreements.

(3) MEMORANDUM OF UNDERSTANDING

Unlike the Status-of-Forces agreements, there is not much commentary concerning the Memorandum of Understanding or the previous "Troop Contribution Agreements" (TCAs). When attempting to determine the existence of obligations concerning accountability of military personnel, the relevant terms to which TCCs have agreed should be the first point of call. Although Zsuzsanna Deen-Racsmany considers[73] the provisions of the Model MOU as amended in 2007, she omits to consider the legal status or corresponding responsibility from the amended terms of the Model MOU. Instead, it is assumed that the MOU is binding in international law without describing it as a treaty. Thus, the aspects of treaty-law that may be applicable here have not been previously discussed in academic literature. Therefore, I will attempt to consider both the legal status of the MOU and the likely consequences if it is a treaty.

(A) HISTORY

Since UNEF I, agreements were concluded or exchanged between the UN and troop-contributing countries governing financial administration and logistics of providing personnel and equipment to peacekeeping operations.[74] The agreement also serves to supplement the terms relating to immunity and privileges attributed to personnel under the Status-of-Forces Agreement.[75] In 1991 a Model Troop Contribution Agreement was drafted based upon previous state practice and use of exchange of letters to serve as a basis of negotiation between contributing countries and the UN.[76] This model agreement was subject

[73] See above n 2.
[74] This was typically done through an exchange of letters see for example *Exchange of Letters constituting an agreement concerning the service with the United Nations Emergency Force of the National Contingent provided by the Government of Finland* 271 UNTS 135 (1957).
[75] Deen-Racsmany, above n 2, at 329; Odello above n 47, at 366.
[76] *Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-keeping Operations* GA A/46/1991 (1991): [1991 TCA].

to important amendments in 1997 and 2007. The 1997 amendment changed the TCA to a "Memorandum of Understanding"[77] and its terms were arguably stripped down to the most basic provisions. The MOU was again amended in 2007 which is the current version the UN and states will work with.

The 2007 amended MOU is one of the most positive developments that came through the UN's many reforms post-2005. The amendments followed several recommendations made by official UN reports and academic commentary.[78] Both the Zeid Report and the first Report of the Group of Legal Experts identified the need for clearly stated provisions governing accountability of personnel, particularly military contingent members.[79] The second Group of Legal Experts Report focussed particularly on the need to include the UN codes of conduct and the Secretary-General's Bulletin concerning sexual exploitation and abuse. Before 2007 the UN Codes were not standardised across all categories of UN personnel.[80]

The 2007 amendments saw the introduction of several detailed provisions pertaining to the application of the UN standards of conduct,[81] discipline,[82] investigations,[83] exercise of jurisdiction and accountability.[84] Furthermore, the amendments changed the purpose

[77] *Reform of the Procedures for Determining Reimbursement to Member States for Contingent-Owned Equipment* GA A/51/967 (1997) Annex. It has also been noted that the 1997 version was never adopted by the General Assembly, therefore the 1997 MOU was never technically a basis for negotiation unlike the 1991 version and the subsequent 2007 MOU see *Report of the Special Committee on Peacekeeping Operations and its Working Group* GA A/59/19/Rev. 1 (2005).
[78] Zeid Report, above n 26, at [25]; *Report of the Special Committee on Peacekeeping Operations and its Working Group*, above n 77, at [39]; *Report of the Group of Legal Experts on Ensuring the Accountability of United Nations Staff and Experts on Mission with Respect to Criminal Acts Committed in Peacekeeping Operations* GA A/60/980 (2006) [First Group of Legal Experts Report] at [64(c)].
[79] Zeid Report, above n 26, at [38]-[46]; First Group of Legal Experts Report, above n 78.
[80] See generally the Second Group of Legal Experts Report, above n 11.
[81] 2007 MOU, art 7 *bis.*
[82] At art 7 *ter.*
[83] At art 7 *quater.*
[84] At arts 7 *quinquiens* and 7 *sexiens*.

provision, adding the words: "to specify United Nations standards of conduct for peacekeeping personnel provided by the Government".[85]

Before looking more closely at the terms of the MOU, it is necessary to investigate what legal status these agreements have. Whether or not the MOU is a treaty will affect the legal consequences that flow from a possible breach and the enforcement strategies that may be employed. It will also affect the interpretation of the terms themselves. Moreover, if there are obligations on TCCs to exercise criminal jurisdiction, then the normative value of those obligations is more cogent.

(B) LEGAL STATUS

A common designation used among scholars to describe the UN-TCC Memorandum of Understanding is an "international agreement" between the UN and contributing states.[86] However, the term "bilateral treaty" has seldom been used.[87] This is despite the fact that there appears to be some consensus that the MOU places obligations on TCCs. Although a treaty need not explicitly be designated as such, the absence of such designation does raise the issue of legal status. International instruments can be legally binding without being a treaty, for example Security Council resolutions. There has been some argument to suggest that the term "international agreement" is different to "treaty", even under the Vienna Conventions.[88] Michael Brandon argues that "international agreement" is more generic than "treaty".[89] Thus, "international agreements" would include treaties and other instruments that would not necessarily fall within the meaning of "treaty" in the relevant Vienna

[85] At art 3.
[86] See for example Opie, above n 65.
[87] But see Simm, above n 50, at 501.
[88] For example see M Brandon "Analysis of the terms "treaty" and "international agreement" for the Purposes of Registration under Article 102 of the United Nations Charter" (1953) *The American Journal of International Law* 49.
[89] Brandon, above n 88, at 51.

Conventions.[90] Therefore, being designated as an "international agreement" by academics and policy-makers does not necessarily mean that the said authors are suggesting that the MOU is (or is not) in fact a treaty.

Moreover, comments made by academics are conflicting on the issue of legal status. One academic has described the MOU as an instrument "adopted by the UN" and compared this with an "international convention".[91] It is unclear whether the author has meant to instead compare the bilateral nature of the MOU with multilateral treaties. Another commentator has gone even further to suggest that neither the SOFA nor MOU have been "adopted in treaty form" referring to the UN Model versions of these agreements.[92] Again it is unclear whether the author means to imply that concluded/negotiated agreements based on the UN Models are not adopted as treaties or that his comments are limited to the Models alone. Furthermore, some other scholars do not list the Memorandum of Understanding under "legal sources" or within the "legal framework" of peacekeeping operations.[93] Nevertheless, as will be explored below, there is an arguable case to suggest that the MOU is a treaty. Despite the evidence, there appears to be nothing in the literature that discusses the applicability of treaty law. I will argue that this is a highly relevant area of law that needs more scholarly attention, particularly when considering the accountability issues for sexual exploitation and abuse.

[90] D Door and K Schmalenbach *Vienna Convention on the Law of Treaties* (Springer, Berlin, 2011) at 30. Vienna Conventions include the *Vienna Convention on the Law of Treaties* 1155 UNTS 331 (opened for signature 1969, entered into force 1980) [1969 Vienna Convention] and the *Vienna Convention on the Law of Treaties between States and International Organisations or Between International Organisations 1986* (opened for signature 21 March 1986, not yet in force) [1986 Vienna Convention].
[91] Deen-Racsmany, above n 2, at 350-355.
[92] Fleck "Securing Status and Protection of Peacekeepers", above n 50, at 150.
[93] See for example, D Fleck *The Handbook of Visiting Forces* (Oxford University Press, Oxford, 2001) at 490-502.

The starting point when determining the status of a Memorandum of Understanding is the presumption that it is a non-binding, informal agreement.[94] Nevertheless, there has been some extensive debate about legal status of MOUs. Whereas Jan Klabbers[95] argues that all MOUs are in fact treaties, Anthony Aust[96] casts doubt on such a proposition. According to Aust, determining the status of MOUs requires looking for evidence of an intention to conclude a treaty.[97] Even after such evidence has been obtained, the MOU may still not in fact be a treaty.[98] Determination may depend on state practice. For the purposes of the current context, it is helpful to compare the benefits of an MOU to a formalised treaty. This is an important consideration given the fact that the previous "Contribution Agreements" were deliberately renamed as "Memoranda of Understanding" in 1997.

There are many practical reasons why states or international organisations may choose to use a Memorandum of Understanding as opposed to a formal treaty. MOUs are not typically subject to same technical process of ratification.[99] In fact, this seems to be one of the principal reasons behind the formal change from "Troop Contribution Agreements" to "Memoranda of Understanding".[100] The Secretary-General followed the recommendation of the Advisory Committee on Administrative and Budgetary Questions which noted at paragraph 7 of its report that:[101]

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[94] Aust, above n 31, at 20.
[95] J Klabbers *The Concept of Treaty in International Law* (Kluwer Law International, Boston, 1996).
[96] See above n 31.
[97] Aust, above n 31, at 33; Klabbers *Concept of Treaty in International Law* also stresses the importance of determining an intention to conclude a treaty, above n 95, at 68. See also C Chinkin "A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations Between States" in S Davidson *The Law of Treaties* (Ashgate, Aldershot, 2004) 223.
[98] Aust, above n 31, at 33.
[99] C Lipson "Why are some International Agreements Informal?" (1991) 45 *International Organization* 495 at 514.
[100] See 1997 MOU, above n 77 note by the Secretary-General; see also *Report of the Advisory Committee on Administrative and Budgetary Questions* GA A/61/646 (1996) at [7].
[101] *Report of the Advisory Committee on Administrative and Budgetary Questions* see above n 100, at [7].

> The term "Contribution Agreement" might cause some difficulty as it would require legislative approval at the national level. This could entail clearance of the agreement through an act in Parliament. Such action would result in undue delays in deployment.

This implies that a TCA did require legislative changes at the domestic level and MOUs do not. Simply on this basis it could be argued that the MOU cannot be a treaty. However, despite the name change it is still generally expected (from the point of view of the UN) that some legislative changes need to be made in order to incorporate the requirements of the MOU.[102] Although the use of a Memorandum of Understanding may avoid the technicalities associated with formal ratification, it seems that the UN still expects its terms to be implemented through domestic law.[103] However, this is not the case for all states. In some (monist) states international agreements or treaties will directly apply as domestic law after ratification or accession, or approval of the legislature.[104] In other (dualist) states, international agreements may only need legislative expression, thus needing extra steps taken by the legislature.[105] Therefore, there may be no practical difference between the processes of implementing a TCA as opposed to an MOU despite the intention outlined above.

The change from TCAs to MOUs may have been influenced by state practice at the time, particularly agreements concerning the protection and status of military forces. The practice

[102] This has been particularly relevant when considering the incorporation of the UN Codes of Conduct and the S-G Bulletin on the protection from sexual exploitation and abuse see *Report of the Special Committee on Peacekeeping Operations and its Working Group*, above n 77, at [40(b)], and was one of the tasks set for the Second Group of Legal Experts Report, above n 11.
[103] See Second Group of Legal Experts Report, above n 11, at [38(a)-(b)].
[104] This is typical of civil law jurisdictions such as Brazil, Egypt, France, Japan, Mexico, Namibia, the Netherlands, Russia see discussion A Byrnes and C Renshaw "Within the State" in D Moeckli, S Shah and S Sivakumaran (eds) *International Human Rights Law* (Oxford University Press, Oxford, 2014) 458 at 461.
[105] This is typical of common law systems such as the Commonwealth countries of Australia, New Zealand and the United Kingdom see Byrnes and Renshaw, above n 104, at 464.

of the United States during the late 1980s and early 1990s was to conclude Memorandums of Understanding to govern matters of defence.[106] Interestingly, from the perspective of the US these MOUs were always meant to be legally binding international instruments.[107] However, some of its partners to these agreements were traditionally of the view that they were not, particularly Commonwealth countries such as the United Kingdom and Canada.[108] It is unclear to what extent the US's view of MOUs as binding agreements had on the decision to change from TCAs or whether the Commonwealth view had greater influence.

Arguably, the form of a Memorandum of Understanding suits the unpredictable nature of the peacekeeping operations. In missions where circumstances are likely to change rapidly or evolve unexpectedly, states must be able to change their agreement with the UN quickly and efficiently.[109] Likewise, the UN may also want to renegotiate the terms of the MOU and effect changes in a timely manner. The decision to establish a mission in the first place and have enough troops contributed in time may also have a bearing on the form of the agreement needed. A formal treaty, even the bilateral kind, can be a lengthy and costly process and their amendments even more so.[110] Moreover, peacekeeping missions concern issues that are highly political.[111] Therefore, the practical benefits of a not-so-formalised instrument can have a positive impact on the efficient functioning of peacekeeping operations.

Evidence of an intention to conclude a treaty may be found in the content of the Memorandum. When looking at the particular form of the Model Memorandum of Understanding it arguably "looks" like a treaty. According to Anthony Aust, there are particular key indicators that can support a claim that a memorandum of understanding is in

[106] J McNeill "International Agreements: Recent US-UK Practice Concerning the Memorandum of Understanding" (1994) *The American Journal of International Law* 821.
[107] McNeill, above n 106, at 821-822.
[108] At 822.
[109] Fleck "Securing status and protection of peacekeepers", above n 50, at 150.
[110] Lipson, above n 99, at 514.
[111] At 514.

fact a treaty;[112] firstly, the use of mandatory and treaty-like language. The MOU uses obligatory language throughout its provisions, such as "shall" instead of discretionary terms such as "may".[113] The MOU also refers to "articles" rather than the less formal term "sections". This seems to be a deliberate change from the previous 1991 model TCA which referred to numbered sections only. Additionally, the preamble concludes with the phrase "[the parties] agree as follows".[114] These terms are more likely associated with treaties rather than informal documents which typically state that the parties "understand" or "decide".[115] Secondly, there are certain provisions that are typically found in treaties. The MOU has provisions governing the amendment of the MOU,[116] the settlement of disputes[117] and termination.[118] Such provisions can however also be found in non-binding MOUs so their presence on their own cannot be determinative.[119] Moreover, the MOU has an "entry into force" article.[120] Thirdly, the MOU is effective upon the signature of representatives of the Government and the UN. The act of signing such an instrument can be evidence of consent to be bound by the terms therein.[121]

Although these attributes are not determinative as to status on their own, together they provide good evidence that the Memorandum of Understanding may have been drafted with

[112] See Aust, above n 31, at 33-36. Anthony Aust is one of the leading authorities on contemporary treaty conception in international law.
[113] Mandatory language had been used in the previous versions of these agreements.
[114] 2007 MOU, preamble.
[115] Aust, above n 31, at 427.
[116] 2007 MOU, art 12.
[117] At art 13.
[118] At art 15.
[119] Aust, above n 31, at 46.
[120] 2007 MOU, art 14. This was also a change from the 1991 Model TCA which did not have such a clause. The move to add the provision when changing the form of the agreement to an MOU may indicate an intention to conclude a treaty. See also, Klabbers *Concept of Treaty in International Law*, above n 95, at 75.
[121] Aust, above n 45, at 96; see also 1986 Vienna Convention, above n 90, arts 11-12; However the Model-MOU's entry in force clause does not state that the parties are to be bound by signature, see 2007 MOU, art 14.

the intention that it be a treaty. Other indicators may come from the subsequent behaviour of both parties.

(I) Subsequent Behaviour - Is the MOU a treaty from the perspective of the UN?

There is evidence to suggest that the United Nations itself treats the MOU as a treaty rather than a non-binding agreement. Some of the concluded Memorandums of Understanding are registered with the Secretariat of the UN and published in the *United Nations Treaty Series*.[122] When it is the Secretariat that registers an instrument there will be a determination made as to whether that document is in fact a treaty.[123] Therefore, the registration may provide good evidence that the MOUs are in fact treaties, at least from the perspective of the UN. However, this practice has been inconsistent with peacekeeping-related MOUs. Moreover, registration alone cannot be said to be determinative.[124] As Aust points out, many instruments have been wrongly registered in the past.[125] Nevertheless, the fact that they are then published in the *United Nations Treaty Series* (and thus available to all member states) may mean that TCCs failing to object to the MOU's "treaty" status may preclude later denial to its status.[126] This would be more cogent if the matter ever arose before the International Court of Justice, which has not yet happened. Additionally, in another relevant publication,

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[122] See for example *Memorandum of Understanding between the United Nations and the Government of Romania contributing resources to the United Nations Special Police Unit in Kosovo* 2421 UNTS 293 (opened for signature 11 February 2001, entered into force 20 February 2002); *Memorandum of understanding between the United Nations and the Government of New Zealand contributing resources to the United Nations in East Timor (DPKO/UNTAET/NZ/04)* 2152 UNTS 3 (opened for signature 27 April 2001, entered into force with retroactive effect 21 February 2000); *Memorandum of Understanding between the United Nations and the People's Republic of Bangladesh contributing resources to the United Nations Mission for the referendum in Western Sahara (MINURSO)* 2716 UNTS 139 (opened for signature 10 December 2010, entered into force with retroactive effect 1 November 2010).

[123] D N Hutchinson "The Significance of the Registration of an International Agreement in Determining whether or not it is a Treaty" in S Davidson *The Law of Treaties* (Ashgate, Aldershot, 2004) 133 at 139. See also Klabbers *Concept of Treaty in International Law*, above n 95, at 79-84.

[124] Klabbers *Concept of Treaty in International Law*, above n 95, at 142.

[125] Aust, above n 31, at 36. Although, this is usually a problem when states register an instrument as the same checks on its legality are often not met see Hutchinson, above n 123 .

[126] Hutchinson, above n 123, at 272-273.

the *UN Treaty Handbook*, the peacekeeping MOUs are used as an example of where MOUs can be legally binding.[127]

Other indications that the MOU may be a treaty have come from various statements made in UN reports or by the Secretary-General. The Secretary-General noted in 1997 that the MOU "entails legally binding rights and obligations and, once concluded, is legally binding on the parties".[128] Likewise, Prince Zeid referred to the MOU giving rise to certain obligations on states and indicated the binding nature of the document.[129] Moreover, the same reports noted that certain legislative changes were required to implement the MOU. However, the need to undertake legislative changes to incorporate the terms of an MOU (or Treaty) will depend on the constitutional framework of each individual state.[130] As such, these statements may be unnecessarily expansive. As stated previously, before the 2007 amendments the UN Codes of Conduct and the S-G Bulletin were not considered binding on all categories of personnel, specifically military contingents.[131] This was particularly concerning to Prince Zeid who recommended their implementation in the MOU for the very purpose that TCCs would then be bound to incorporate the standards into their own military codes of conduct.[132] The fact that the MOU was seen to have such an effect supports the argument that it is a treaty.

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[127] "Glossary" *UN Treaty Handbook* (Prepared by the Treaty Section of the Office of Legal Affairs, UN Publications, 2006) at 61.
[128] *Reform of the Procedures for Determining Reimbursement to Member States for Contingent Owned Equipment*, above n 77, at [2].
[129] See for example Zeid Report, above n 26, at [80].
[130] See above notes 104 and 105 and corresponding explanations of the differences between monist and dualist states.
[131] Zeid Report, above n 26, at [20]; Second Group of Legal Experts Report, above n 11, at [37].
[132] See generally Second Group of Legal Experts report, above n 11; see also Zeid Report, above n 26, at [25].

(II) SUBSEQUENT BEHAVIOUR - IS THE MOU A TREATY FROM THE PERSPECTIVE OF STATES?

The Special Committee on Peacekeeping Operations met in 2006 and 2007 to discuss re-drafting the Model Memorandum of Understanding.[133] The Committee included representatives from prominent troop-contributing countries such as Bangladesh, India and Pakistan,[134] as well as representatives from top financing states such as France, Japan and the United States.[135] These sessions of the Special Committee were closed to the public.[136] With no information on the Committee's deliberations and in the absence of statements from troop-contributing countries, it is difficult to ascertain how states view the MOU's legal status.

Arguably, the lack of outcome reports to the UN (as seen below, this is an obligation under the MOU) could be evidence of state behaving as if the MOU is not legally binding, or a treaty.[137] However, this may indicate a simple breach of treaty obligations.

(III) DEFINITION OF "TREATY" IN THE 1986 VIENNA CONVENTION

Traditionally, states have been the primary subjects of international law and so have the necessary legal personality for concluding treaties between each other. However, it is equally well established that international organisations (IOs) may have similar treaty-

[133] *Report of the Special Committee on Peacekeeping Operations and its Working Group* GA A/61/19/Rev.1 (2007) at [14] and Annex "Composition of the Special Committee on Peacekeeping Operations at its 2007 session".
[134] *Report of the Special Committee on Peacekeeping Operations and its Working Group*, above n 133; Department of Peacekeeping Operations "Ranking of Military and Police Contributions to UN Operations" (August 2015) <https://www.un.org >.
[135] *Report of the Special Committee on Peacekeeping Operations and its Working Group*, above n 133; United Nations Peacekeeping "Financing Peacekeeping" (August 2015) <https://www.un.org>.
[136] An Official Information Act (OIA) application was made by the author to the New Zealand Ministry of Foreign Affairs & Trade in 2014 in order to obtain information from the Special Committee's meetings on the draft MOU where New Zealand was included (in 2006 and 2007). However most of that information has been rendered classified.
[137] *Special Measures for the Protection from Sexual Exploitation and Abuse* (2013), above n 14, at [15].

making powers resulting from their requisite constituent treaty and international legal personality.[138] The United Nations in particular has the necessary legal personality to make agreements with states, even though that power is not explicitly provided for in the UN Charter.[139] The 1986 *Vienna Convention on the Law of Treaties between States and International Organisations or Between International Organisations* was intended to govern such treaties concluded with IOs.

The 1986 Vienna Convention is the partner of the *1969 Vienna Convention of the Law of Treaties between States.* The 1969 Convention was drafted by the International Law Commission (ILC) and regulates the application and interpretation of treaties. It has been generally accepted that its provisions have customary law status.[140] However, its application was limited to treaties between states.[141] The ILC effectively transferred those rules from the 1969 Convention to the 1986 Convention thus making them applicable to treaties with IOs.[142] Unlike its 1969 counterpart, the 1986 Convention is currently not in force. Nevertheless, as its provisions closely follow those in the 1969 Convention they may also represent custom.[143] Moreover, the similarities are perhaps the reason for the difference in the number of signatories.[144] Therefore, the 1986 Convention is directly relevant to the

[138] As the General Assembly noted in the introduction of the *1986 Vienna Convention* "international organisations possess the capacity to conclude treaties which is necessary for the exercise of their functions and the fulfilment of their purposes." *Vienna Convention of the Law of Treaties Between States and International Organisations or Between International Organisations* GA A/CONF.129/15 (1986).
[139] See *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174.
[140] See for instance *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1971] ICJ Rep 16 at [94].
[141] 1969 Vienna Convention, above n 90, art 1.
[142] G Gaja "A "New" Vienna Convention on Treaties Between States and International Organisations or Between International Organisations: A Critical Commentary" (1987) 58 *British Yearbook of International Law* 253.
[143] Aust, above n 31, at 400; J Klabbers *International Law* (Cambridge University Press, Cambridge, 2013) at 42.
[144] Aust, above n 31, at 400: Klabbers *International Law*, above n 143, at 42.

question of legal status of the MOU. Moreover, due to their similarities, jurisprudence and commentary on the 1969 Convention and its principles are also relevant.

Article 2 of the 1986 Convention defines “treaty” as the following:

> (a) “treaty” means an international agreement governed by international law and concluded in written form:
>
> (i) between one or more states and one or more international organization.

Article 3 goes on to describe the scope of the 1986 Vienna Convention:

> The fact that the present Convention does not apply:
>
> (i) to international agreements to which one or more states, one or more international organizations and one or more subjects of international law other than states or organizations are parties.
>
> (ii) to international agreements which one or more international organization and one or more subjects of international law other than states are a party
>
> (iii) to international agreements not in written form ...
>
> (iv) to international agreements between subjects of international law other than states or international organizations.

Upon examination of these provisions it would seem that the MOU would fall within the scope of the Convention, assuming that it is at least arguable that the Memorandum is an “international agreement governed by international law”. The MOU is in written form and is between a state and an international organisation. Therefore, the 1986 Vienna Convention’s provisions governing interpretation and breach may be applicable.

(IV) THE ANNEXED DOCUMENTS – THE EXTENT TO WHICH SEXUAL EXPLOITATION AND ABUSE ARE INCORPORATED

There are three documents relevant to sexual exploitation and abuse that collectively form part of the policies and codes of conduct; these include two UN Codes of Conduct (*We are United Nations Peacekeeping Personnel* and *Ten Rules: Code of Personal Conduct for Blue Helmets*)[145] and the Secretary-General's *Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abu*se.[146] Although it was recommended in the Zeid Report that the all three documents should be attached to the MOU, only one of these documents has made it to the final amendment.[147] Annex H includes all the terms from *We are United Nations Peacekeeping Personnel* but neglects to add the entirety of the *Ten Rules* and the S-G Bulletin. However, some aspects of the S-G Bulletin have nevertheless been introduced into the body of the MOU.

Annex H came out of recommendations made by the Group of Legal Experts Report *Making the Standards Contained in the Secretary-General's Bulletin binding on Contingent Members*.[148] In order to standardise the UN Codes and the S-G Bulletin across all categories of personnel the Group of Legal Experts edited both the *Ten Rules* and *We are United Nations Peacekeepers* to incorporate the spirit of the S-G Bulletin.[149] It was then suggested by the Group of Legal Experts both documents be annexed to the Memorandum of Understanding. As noted above however, only one of these documents made the final

[145] See above n 33.
[146] See above n 34.
[147] 2007 MOU, Annex H.
[148] Above n 11.
[149] Second Group of Legal Experts Report, above n 11, at [55]-[59], Annex III and Annex VI. Interestingly, the *Ten Rules* document was also entirely reworded in order to be "less ambiguous", at [57].

draft.[150] Annex H contains the contents of *We are United Nations Peacekeepers* and the following additions:[151]

> We will always ... report all acts involving sexual exploitation and abuse
>
> We will never ... commit any act involving sexual exploitation and abuse, sexual activity with children under 18, or exchange of money, employment, goods or services for sex.
>
> We realise that the consequences of failure to act within these guidelines may ... result in administrative, disciplinary or criminal action.

Arguably, the additions do contain the spirit of the S-G Bulletin.[152] The Annex covers the key aspects of the zero-tolerance policy; it makes reference to "sexual exploitation and abuse" which is further defined in another annexed document (see below). Additionally, it covers the prohibition of sexual activity with minors. It also makes clear that there will be enforcement action taken against those that contravene the codes.

There are a couple of notable omissions, such as the exchange (of sex) for "other forms of humiliating, degrading or exploitative behaviour" and "assistance that is due to beneficiaries of assistance".[153] These are more associated with survival-sex-type relationships and there is no direct reference to this in Annex H.[154] This is arguably not covered by the vague and broader requirement of "we will never ... become involved in sexual liaisons that could affect our impartiality or the well-being of others".[155]

[150] There is no information as to the reasons why only one document was included in the final draft.
[151] See 2007 MOU, Annex H; Second Group of Legal Experts Report, above n 11, Annex III.
[152] See for example S-G Bulletin (2003), above n 34, at [3.2(a), (b) and (e)].
[153] At [3.2(c)].
[154] However, it is arguable that the terms "exchange of ... goods or services for sex" may cover survival sex.
[155] 2007 MOU, Annex H.

The main body of the Memorandum of Understanding also makes reference to the standards. Article 7 *bis* states that:

> The Government shall ensure that all members of the Government's national contingent are required to comply with the United Nations standards of conduct set out in annex H to the present memorandum of understanding.

This provision points to those standards in Annex H only; there is no mention of the other two documents. Article 7 *ter* governs the requirements of TCCs to ensure good discipline of their national contingent members. The article refers to the general phrase "... ensure compliance with the United Nations standards of conduct". This must be read together with art 7 *bis* which is titled "United Nations standards of conduct", thus limiting the phrase to those standards in Annex H.

Interestingly, there are references made to "misconduct" and "serious misconduct" in other provisions including art 7 *quater* (investigations), art 7 *quinquiens* (exercise of jurisdiction by the Government) and art 7 *sexiens* (accountability). The interpretation of these sections will be discussed further below, but it is sufficient for current purposes to point out that they arguably imply the inclusion of sexual exploitation and abuse. This is due to the definition of "serious misconduct" which is provided for in Annex F as the following: "... Sexual exploitation and abuse constitute serious misconduct." Both "sexual abuse" and "sexual exploitation" are further defined in Annex F as having the exact same meaning as in the S-G Bulletin.[156] Therefore, the meaning of "sexual exploitation" given in Annex F would cover survival-sex-type relationships, thus filling any gap provided by the standards in Annex H.

[156] "Sexual abuse means the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions. Sexual exploitation means any actual or attempted abuse of a position of vulnerability, differential power or trust for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another" see 2007 MOU, Annex F "Definitions"; see also S-G Bulletin (2003), above n 34, at [1].

As sexual exploitation and abuse related standards are mostly incorporated through annexes, it is now necessary to turn to the issue of legal status of the annexed documents.

It has been asserted that not all documents annexed to the MOU are legally binding.[157] In the Zeid Report, it was noted that mission-specific *Guidelines to Troop-Contributing Countries* were not binding although they are subsequently attached to the MOU.[158] These "guidelines" were contrasted with "rules" where it was explained that the latter was of greater legal status than mere guidelines.[159] This reasoning would suggest that whether or not those documents attached to the MOU are legally binding depends on the legal status of the individual documents. As argued in Chapter Two, the UN Codes of Conduct are more likely to represent policy documents rather than having any binding force. Therefore, it would seem on the above reasoning that although *We are United Nations Peacekeepers* is attached to the MOU it is not legally binding in the same way as the MOU itself. Moreover, the "Definitions" section in Annex F would similarly not be legally binding, as alone it is a mere glossary of terms.

According to Anthony Aust, unless there is a provision stating that the annexes are "integral" to the treaty/instrument the presumption is that they are not binding.[160] Article 2 of the MOU states "this document, including all of its annexes, constitutes the entire memorandum of understanding". This is a strong indication that the annexes, including the definitions in Annex F, form part of the MOU – therefore part of the "treaty". However, the statements about the non-binding nature of the *Guidelines to Troop-Contributing Countries* are not easily reconciled with a conclusion that the annexes are binding. It may be that only the

[157] See Zeid Report, above n 26, at [20]; Deen-Racsmany, above n 2, at 331.
[158] See for example 2007 MOU, Annex G.
[159] Zeid Report, above n 26, at [20].
[160] Aust, above n 31, at 436-437.

Guidelines specifically are not binding. The Zeid Report and subsequent academics[161] have not mentioned the status of the other annexed documents, of which there are currently seven.[162] Moreover, as stated above, annexing the UN standards of conduct to the MOU was recommended on the basis that they would bind TCCs and their contingent members. Previously, UN standards were annexed to the *Guidelines* (not legally binding). In any case, Annexes H and F may be important for the purposes of interpretation.

In sum, sexual exploitation related standards are arguably incorporated in the MOU in their entirety; however, this has been primarily achieved through the use of annexes. Assuming that Annexes H and F form part of the content of the Memorandum (and that the MOU is a treaty) then troop-contributing countries are arguably bound by them. This would mean that the standards may also be distinguished from mere policy documents, rather they are instruments giving rise to certain legal obligations. One of those "obligations" would be to ensure relevant pre-deployment training in the standards and incorporate them into national military codes, as provided in art 7 *bis.*[163] The reference in Annex H to accountability for contravention of standards, including sexual exploitation and abuse, may provide further obligations – particularly when read together with other provisions of the MOU, such as art 7 *quinquiens.*

(C) Provisions of the 2007 Model-Memorandum of Understanding

Proceeding on the assumption that the Memorandum of Understanding is in fact a treaty, it is necessary then to examine the terms of the MOU and consider whether there are binding obligations on TCCs to exercise their criminal jurisdiction in response to sexual exploitation and abuse committed by military personnel. There are three provisions of the current Model

[161] Deen-Racsmany, above n 2.
[162] See 2007 MOU, art 2.
[163] This also may be implied from the purpose section of the 2007 MOU, see art 3 "... and to specify United Nations standards of conduct for personnel provided by the Government".

MOU that directly apply to this inquiry; arts 7 *quinquiens* (exercise of jurisdiction by the Government), 7 *quater* (investigations), and 7 *sexiens* (accountability). Read together these provisions indicate that TCCs are required to take certain steps to "exercise their criminal jurisdiction" (such as handing over a case to the appropriate national authorities) but are not necessarily obligated to take other steps (for example, prosecute offenders).

(I) ARTICLE 7 *QUINQUIENS*

The first article to examine concerns the issue of formal assurances obtained from TCCs that they will exercise their criminal jurisdiction. Article 7 *quinquiens* reads: [164]

> Military members and any civilian members subject to national military law of the national contingent provided by the Government are subject to the Government's exclusive jurisdiction in respect of any crimes or offences that might be committed by them while they are assigned to the military component of [UNPKO]. The Government assures the UN that it shall exercise such jurisdiction with respect to such crimes or offences.
>
> The Government further assures the UN that it shall exercise such disciplinary jurisdiction as might be necessary with respect to all other acts of misconduct committed by any members of the Government's national contingent while they are assigned to the military component of [UNPKO] that do not amount to crimes or offences.

An assurance that the TCC will exercise their criminal jurisdiction is not an assurance of prosecution. The decision as to whether or not to prosecute is a matter of state sovereignty

[164] 2007 MOU, at art 7 *quinquiens* [7.22]-[7.23].

which has not been interfered with by the provision of such assurances.[165] So what does the formal assurance mean? The assurance is firstly directed at the UN itself; the TCC does not "assure" the host state or victims that they will provide justice. This is consistent with the complete silence of the MOU regarding victims and a lack of consideration of the host state. Secondly, the provision is one-sided; the TCC assures the UN that they will exercise their jurisdiction but the provision does not explicitly authorise the UN to enforce this. Therefore, art 7 *quinquiens*, if it can be construed as an obligation to exercise criminal jurisdiction, does not satisfy the principle of host state ownership. Furthermore, there can be no guarantee that justice will be seen to be done. There is no explicit authority for the UN to take leadership within this provision either.

Before the amendments in 2007, some scholars[166] and authors of UN reports[167] lamented the absence of these assurances in practice. Although the early Troop Contribution Agreements made similar provision for assurances, the 1997 redrafting dropped this requirement. The withdrawal of the assurance clause represented practice at the time, where formal assurances were not actively sought from TCCs despite the fact that they were still required by the Status-of-Forces Agreement.[168] It was argued that a re-introduction of the provision would place more pressure on contributing states to hold their military forces to account.[169] Whether or not this translates into a binding obligation is unclear.

The principles of treaty interpretation may be helpful for the purposes of this inquiry. Article 31 of the 1986 Vienna Convention states the general rule of treaty interpretation which is

[165] Zeid Report, above n 26, at [80]. An assurance that the state will exercise criminal jurisdiction assumes that the state would have asserted or prescribed extraterritorial jurisdiction over the act in question.
[166] For example, A Miller "Legal Aspects of Stopping Sexual Exploitation and Abuse in UN Peacekeeping Operations" (2006) 39 *Cornell International Law Journal* 71; M Nuldo "The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers During Peacekeeping Missions" (2009) 27 *Berkeley Journal of International Law* 127.
[167] For example, Zeid Report, above n 26.
[168] Deen-Racsmany, above n 2, at 329.
[169] Zeid Report, above n 26.

simply to interpret the text in good faith according to the ordinary meaning of the words in their context and "in light of its object and purpose".[170]

Starting with the ordinary meaning of the words alone; is an "assurance" an agreement to be bound to exercise criminal jurisdiction? Or is it a mere expectation? The 1991 TCA did not make reference to an assurance but rather that the national government "agrees" to exercise criminal jurisdiction.[171] Nevertheless, the 1991 TCA does seem to be strongly worded in comparison to the art 7 *quinquiens* of the 2007 MOU. Arguably, to agree to exercise jurisdiction seems to indicate the involvement of both parties in reaching that decision in drafting the TCA; that the UN expects the TCC to exercise their jurisdiction and that the state has agreed to do so. When the similar provision was put back into the Model MOU the word used is not "agree" but that the TCC "assures" that it will exercise jurisdiction – is this signifying something less than an "agreement" or is it an equivalent term? The absence of "assures" from the Definitions (Annex F) suggests that it does not have any "special meaning".[172]

A provision such as art 7 *quinquiens* was supported by both the Zeid Report[173] and the Group of Legal Experts Report.[174] In fact, the Group of Legal Experts recommended that contribution should only be made on the basis that formal assurances will be made, and this should be required under the MOU.[175] However, it has been argued that the wording that eventually made the amendment is not such a key provision; for example, Deen-Racsmany labels the article a "watered down" version of the 1991 Contribution Agreement.[176]

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[170] It has been established that these principles reflect customary international law, see *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) (Merits)* [2002] ICJ Rep 625 at 23-24.
[171] 1991 TCA, above n 76, at VIII [25].
[172] 1986 Vienna Convention, above n 90, art 31(4).
[173] Zeid Report, above n 26, at [80].
[174] Second Group of Legal Experts Report, above n 11, at [18(i)].
[175] At [18(i)].
[176] Deen-Racsmany, above n 2, at 339.

Although it should be remembered that despite the strong wording in 1991 formal assurances were not often sought therefore the provision was not reflected in practice.

The principles of treaty interpretation dictate that the ordinary meaning must be read in light of the context and the object and purpose of the treaty itself. The object and purpose may be inferred from the text of the treaty (such as the preamble and even its annexes) and by reading the treaty as a whole.[177] The TCA and the 1991 MOU were created undoubtedly for the purpose of supplying troops and equipment to UN peacekeeping missions. However, the amended MOU has the additional articles detailing the accountability of troops. These additions are detailed and considered; the majority of the model agreement is now taken up with accountability provisions. Such a change must have an impact on the object and purpose of the MOU.

Conveniently, the 2007 MOU does have a purpose section, which includes: "to specify United Nations standards of conduct for personnel provided by the Government".[178] This phrase represents a change from a previous draft which was much more specific and clearer that improved accountability of peacekeeping personnel was a central issue.[179] The purpose is now limited to the UN standards of conduct. However, Deen-Racsmany notes that this should not alter the general impression of the previous wording as when read within the context of the other changes made it is clear accountability is still part of the purpose of the MOU.[180] I generally agree with this proposition, especially when taking Annex H into the

[177] F Jacobs "Varieties of Approach to Treaty Interpretation: with Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference" in S Davidson (ed) *The Law of Treaties* (Ashgate, Aldershot, 2004) 297 at 298 also termed the "teleogical approach".
[178] 2007 MOU, art 2.
[179] "... and to provide for the maintenance of discipline and good order among such personnel and the investigation of, and accountability for, violations" *Revised Draft Model Memorandum of Understanding*, above n 35, at 4.
[180] Deen-Racsmany, above n 2, at 335, footnote 76.

consideration.[181] It is noted in Annex H that criminal accountability is expected from TCCs where their national contingents breach the standards which translate into crimes in their domestic law.[182]

Arguably, the additional provisions[183] all have a similar theme; as noted above, the reasoning behind the 2007 amendments was to improve accountability of peacekeeping personnel (but not to improve the accountability of states themselves). Additionally, these recommendations were made specifically with sexual exploitation and abuse in mind. They are also the most detailed provisions. Together with the purpose and Annex H, this could suggest that the object and purpose includes holding contingent members to account for their criminal acts. On the above reasoning, the requirement that TCCs "assures" the UN that the Government will exercise criminal jurisdiction can be interpreted as an obligation to do so.

In some circumstances the intention of the parties can shed light on the interpretation of certain provisions.[184] In order to determine the intentions of the parties it is helpful to look to the preparatory work of the 2007 MOU.[185] As part of the preparatory work on the amended MOU, the Secretary-General issued a commentary on the new provisions.[186] Commenting on art 7 *quinquiens* the Secretary-General noted simply that the provision gives effect to the requirement under art 48 of the Model Status-of-Forces Agreement (that the TCC should provide an assurance they will exercise criminal jurisdiction).[187] However, the draft art 7 *quinquiens* the Secretary-General commented on is different to the version that was finally

[181] As noted above, Annex H could either form part of the content of the MOU (thus legally binding) or serve as a useful tool for interpretation.
[182] 2007 MOU, Annex H.
[183] Namely arts 7 *bis*,7 *ter*, 7 *quater*, 7 *quinquiens* and 7 *sexiens.*
[184] See Aust, above n 31, at 244.
[185] Article 32 1986 Vienna Convention, these are supplementary means of interpretation.
[186] Above n 35.
[187] *Revised Draft Model Memorandum of Understanding*, above n 35, at 12.

accepted. Arguably, the original version had much stronger (and contained obligatory) wording:[188]

> It is ... understood that this exclusive jurisdiction is based on the understanding that the Government will exercise such jurisdiction as might be necessary with respect to crimes or offences committed by members of the Government's national contingent while they are so assigned.

Arguably, the above paragraph is quite clear about what is expected from the contributing state. It also aligns with the reasoning of assurances when first adopted after UNEF I.[189] Nevertheless; this additional language was dropped in the final version. It is difficult to assess whether the omission means that the current version has been "watered down" in its effect as the reasoning behind the change has not been publically released.[190] It could be equally arguable that these words would not have added anything material to the requirement under the provision.

Overall, the meaning of art 7 *quinquiens* is unclear because there is limited information about the intention of both parties. Information that is available comes from the pre-drafting stages such as the official recommendations. There is enough evidence to suggest that the UN expects that the TCC will exercise criminal jurisdiction and they may be obligated by art 7 *quinquiens*. However, there is further evidence to counter this proposition as seen by comparing the previous draft of the provision and the similar yet stronger worded provision under the 1991 TCA. Nevertheless, reading the MOU as a whole it would seem that the ordinary meaning of art 7 *quinquiens,* taking into consideration the additional and detailed provisions made in 2007, suggests that an "assurance" is likely an obligation on the TCC to

[188] At 56.
[189] See above n 57 and accompanying text.
[190] Thus, there is no record of various states' opinion on the draft.

exercise their criminal jurisdiction. But this still leaves the question of what amounts to the "exercise of criminal jurisdiction"? Other provisions of the MOU help shed some light on this issue.

(II) OTHER "OBLIGATIONS"?

Article 7 *quater* is a particularly lengthy provision governing the investigation of contingent members for misconduct and serious misconduct.[191] Although it is reiterated several times that the contributing state has the exclusive jurisdiction with such investigations,[192] the provision attempts to split up investigative duties between the TCC and the UN in certain circumstances. For instance, where the national Government fails to initiate a preliminary investigation when it has received a complaint, the UN's investigative arm (the Office of Internal Oversight Services) will take over this task.[193] Although it is specified that in such cases the Government will be considered to be "unwilling or unable" to conduct such investigations, the UN will be limited to an administrative investigation.[194] This is where information is gathered (for example, contact details of witnesses) and is held by OIOS until a formal investigation can be undertaken by the relevant TCC's national investigation teams.[195] It is still up to the TCC to make a decision whether to investigate or not.[196]

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[191] Misconduct means "any act or omission that is a violation of United Nations standards of conduct, mission specific rules and regulations or the obligations towards national and local laws and regulations in accordance with the status-of-forces agreement where the impact is outside the national contingents." Serious misconduct "is misconduct, including criminal acts, that results in or is likely to result in, serious loss, damages or injury to an individual or to a mission. Sexual exploitation and abuse constitute serious misconduct." See 2007 MOU, Annex F.

[192] 2007 MOU, art 7*quater* at [7.10] and [7.20].

[193] 2007 MOU, art 7 *quater* at [7.13].

[194] This will not include the interviewing of witnesses for example, see 2007 MOU, Annex F at [30].

[195] 2007 MOU, art 7 *quater at* [7.16, 7.17] and Annex F [33]; see also T A Shockley "The Investigation Procedures of the United Nations Office of International Oversight Services and the Rights of the United Nations Staff Member: An Analysis of the United Nations Judicial Tribunals' Judgments on Disciplinary Cases in the United Nations" (2015) 27 *Pace International Law Review* 468 at 485.

[196] 2007 MOU, art 7 *quater* at [7.15].

If requested by the Government, the UN has agreed to assist the national investigation officers in several different ways.[197] The Office of Internal Oversight Services will attempt to work with members of the national investigative team as much as possible to this end. Nevertheless, art 7 *quater* emphasises several times that it is the representatives of the TCC that are in charge of investigations.[198] The UN provides support only. The provision also draws attention to the sovereign right of the TCC to investigate their national contingent members.[199] Since May 2015, the UN has encouraged a sixth-month time limit to conduct formal investigations, without any additional enforcement mechanism in place to make sure TCCs adhere to the time limit or otherwise exercise their criminal jurisdiction outside the MOU.[200]

There appears to be no indication of an obligation to investigate per se within art 7 *quater*, at least on the TCC. The provision instead seems to focus more on the role of the UN and its own obligations, particularly in relation to the information it collects in its administrative investigations. Such information must return to the contributing state. This is important for the contributing state to adhere to the requirements under arts 7 *ter* (discipline) and 7 *quinquiens* (exercise of criminal jurisdiction).[201] Moreover, any support the UN gives is subject to the decisions of the national investigative teams.[202] However, in turn the Government is required to make sure contingent commanders cooperate with any UN investigation.[203]

[197] At art 7 *quater* at [7.17, 7.18].
[198] At art 7 *quater* at [7.10, 7.20].
[199] At art 7 *quater* at [7.21].
[200] UN Conduct and Discipline Unit "Fact Sheet on Sexual Exploitation and Abuse" (3 September 2015) <http://cdu.unlb.org>.
[201] See *Revised Draft Model Memorandum of Understanding*, above n 35, at 10.
[202] 2007 MOU, arts 7 *quater* at [7.10,] and [7.20].
[203] At art 7 *quarter* at [7.14]; *Revised Draft Model Memorandum of Understanding*, above n 35, at 10.

The only obligatory language used in art 7 *quater* relates to the TCC concerns informing the UN of *prima facie* cases received by them and the act of forwarding the case to the appropriate national authorities:[204]

> In the event that the Government has *prima facie* grounds indicating that any member of its national contingent has committed an act of serious misconduct it shall without delay inform the United Nations and forward the case to its appropriate national authorities for the purposes of investigation.

Prince Zeid noted that the provisions, when read together, "obliged" the TCC to submit the case to the appropriate national authorities.[205]

Submitting a case to the appropriate national authorities seems to be the first step in the exercise of criminal jurisdiction under art 7 *quinquiens.*[206] This can be supported by the inclusion of similar provisions made in art 7 *sexiens.* If the outcome of a UN investigation or that of the Government reveal that the allegations were well founded then the case must be "forwarded to [the TCCs] appropriate authorities for due action".[207] Such action would include initiating formal investigation (if the allegation is "well-founded" under a UN administrative investigation) or a decision whether or not to prosecute.[208] Therefore, this step seems to be an obligation under the MOU. However, the provisions governing what the TCC is expected to do after this step is taken seem to defer to the sovereign right of the TCC to make such decisions. For instance, it appears from the language of art 7 *quarter* that formal investigation of allegations is considered a matter of sovereignty; it is up to the prosecutorial discretion of that TCC. This is similar to the approach taken under art 7

[204] 2007 MOU, art 7 *quater* at [7.11].
[205] Zeid Report, above n 26, at [80].
[206] *Revised Draft Model Memorandum of Understanding,* above n 35, at 13.
[207] 2007 MOU, art 7 *sexiens* at [7.24].
[208] *Revised Draft Model Memorandum of Understanding,* above n 35, at 15.

quinquiens where it is generally accepted that the UN cannot obligate the contributing state to prosecute as this is also a matter of sovereignty. Again, there is no guarantee that justice will be seen to be done because the TCCs are not obligated to investigate and prosecute, rather only to forward the case to the appropriate national authorities. The UN has some leadership within these provisions to initiate administrative investigations where the TCC has failed to do so, although this does not amount to formal criminal investigation (needed to bring forward prosecution and punishment for sexual exploitation and abuse).

(III) REPORTING REQUIREMENTS

Although not strictly attached to the "exercise of criminal jurisdiction", the UN has added the requirement of reporting back on outcomes of cases in arts 7 *quater* and 7 *sexiens*. The UN has put much emphasis on the reporting requirements under the Memorandum. Reporting of outcomes is incredibly important for transparency to victims, their communities and the host state itself. Although there has been a recent improvement, the Secretary-General has in his annual reports noted with disappointment the continued lack of reporting back to the UN on the outcomes of cases.[209] Article 7 *sexiens* requires that "the Government agrees to notify the Secretary-General of progress on a regular basis, including the outcome of the case".[210] Moreover, the Zeid Report suggested that certain consequences should attach to the failure to comply with "reporting obligations".[211]

[209] See for example *Special Measures for the Protection from Sexual Exploitation and Abuse* (2013), above n 14, at [21]; *Special Measures for the Protection from Sexual Exploitation and Abuse* (2014), above n 22, at [27]-[28]; Report of the Secretary-General *Special Measures for the Protection from Sexual Exploitation and Abuse* GA A/69/779 (2015) at [28]-[29].
[210] 2007 MOU, art 7 *sexiens* at [7.24]. The provision notes that the reports "include" outcomes of cases, this would seem to indicate that the reporting requirements are not limited to this.
[211] Zeid Report, above n 26, at [82].

(IV) THE MOU AS A TREATY

There are several consequences that flow from the MOU being interpreted as a treaty. As MOUs are signed between the UN and each troop-contributing country, its provisions may have cogent normative value; for example, the binding agreement detailing obligations on TCCs to exercise criminal jurisdiction by forwarding a case to the national authorities carries more normative weight if the MOU is considered a treaty. And the normative value of these obligations is important if the UN wants to use coercive measures against TCCs for failing to discharge them. Additionally, if it is at least arguable that the above observations are correct (that contributing countries are obligated under the terms of the MOU to submit a case to the appropriate national authorities and are also obligated to regularly report outcomes to the UN) then the principle of *pacta sunt servanda* will apply.[212] Article 26 of the 1986 Vienna Convention states that "every treaty in force is binding on the parties and must be performed by them in good faith". Therefore, if there was evidence to suggest that the TCC was not submitting cases to their national authorities to either investigate or make a decision whether to prosecute then this may amount to a breach of the Memorandum of Understanding.

(D) A BREACH OF THE MEMORANDUM OF UNDERSTANDING

Pending a breach of a treaty there can be various consequences that flow from this. Among these can be unilateral termination of the treaty or countermeasures.[213] A treaty may be terminated or its operation suspended by one party in certain circumstances; these include a

[212] This principle is a well-established customary norm see *Nuclear Test cases (Australia v France)* [1974] ICJ Rep 253; *(New Zealand v France)* [1974] ICJ Rep 475.
[213] Countermeasures will be covered in Chapter Five: State Responsibility.

fundamental change in circumstances,[214] impossibility of performance[215] and material breach.[216] Of the most relevant applicable circumstance is material breach.[217]

A "material breach" is defined under art 60(3) of the 1986 Vienna Convention as:

> (a) a repudiation of the treaty not sanctioned by the present Convention; or
>
> (b) the violation of a provision essential to the accomplishment of the object and purpose of the treaty.

The International Court of Justice (ICJ) has used much stronger language in relation to this section stating that for a breach to be considered "material" it must be "of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship."[218] Article 60(3) seems to set a deceivingly high threshold as noted by the lack of successful claims before the ICJ.[219] As argued above the object and purpose may include holding contingent members to account for their criminal acts. I argue that failing to at least forward a case to the appropriate national authorities could qualify as a material breach. It would directly hinder the process of accountability of contingent members. However, failure to report back to the UN on outcomes may not be a material breach. The reporting requirements are not strictly attached to the obligation to exercise criminal jurisdiction. It is an added requirement for information (that is not limited to the outcome of cases).

If it is arguable that failing to hand a case over to national authorities is a material breach, then there are certain procedures that both parties must go through before a treaty can be

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[214] 1986 Vienna Convention, above n 90, art 62.
[215] At art 61.
[216] At art 60.
[217] Impossibility of performance relates directly to the object of the treaty, in Peacekeeping this would be the Operation itself.
[218] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, above n 140, at 47.
[219] G Triggs *International Law Contemporary Principles and Practices* (2nd ed, LexisNexis Butterworths, Chatswood, 2011) at 133.

terminated. Articles 65-67 of the 1986 Vienna Convention cover such procedures. The troop-contributing country should first be notified of the proposed breach and given a period of time to object. The Vienna Conventions prioritise peaceful means to resolve such issues, such as negotiations between the parties and arbitration. Thus, the dispute resolution mechanism in the MOU itself should be initiated first.

The Model Memorandum of Understanding has its own dispute resolution mechanism that should be the first point of call. Therefore, it is necessary to briefly examine art 13. There are three-levels of dispute resolution envisioned by the Model-MOU, the first two consisting of negotiation between the parties and the third by way of binding arbitration before the ICJ.[220] Either party may initiate the mechanism, thus it would be available for the UN if it was considered that TCCs were not adhering to the requisite obligations. Deen-Racsmany points out that this would be a highly costly avenue for the UN if they were to confront a contributing state on each and every case of non-compliance.[221] This is perhaps the reason that the arbitration mechanism has never been used. Furthermore, it may also be unlikely to achieve the necessary results (ie enforce the exercise of criminal jurisdiction) as it arguably relies on the will of each state to cooperate with the mechanism.[222]

Should termination of the treaty be determined as the best course of action (or the peaceful means of dispute resolution fail) then which organ of the UN has the power to implement termination? Under art 67(2) Vienna Convention where there is an act declaring termination, if signed by a representative of an organisation, they may be called upon to produce "full powers". "Full Powers" refers to individuals with the authority to sign treaties on behalf of

[220] See 2007 MOU, art 13 at 13.1-13.2.
[221] Deen-Racsmnay, above n 2, at 342.
[222] 2007 MOU, art 13 states that both parties must agree on an arbitrator. An un-willing state may not agree and thus be limited to continued negotiations between the UN and the TCC.

Heads of States or International Organisations.[223] Although there is less significance associated with full powers in modern treaty making law, the signature or termination of treaties should be undertaken by those with particular authority to do so.[224] The General Assembly has only the power to give recommendations.[225] Perhaps only the Security Council has such power to terminate the MOU. The Security Council is the only body within the UN that can initiate a UN Peacekeeping Operation.[226] Therefore, by that reasoning the Council should be the only body to end the contribution to one. However, it is the Secretary-General that has in the past removed contingents from peacekeeping.

In 2005, members of the Ukrainian engineering and demining contingent operating in the UN Interim Force in Lebanon (UNIFIL) were implicated in serious financial misconduct concerning significant theft of fuel.[227] As a response, the Secretary-General asked the Ukrainian government to withdraw this contingent which was subsequently replaced with troops from China.[228] It is not clear on what grounds this request was made ie whether it was based on a provision in the MOU. Additionally, the Secretary-General himself has made statements to suggest that he has the authority to remove contingents, seemingly without the consent of the troop-contributing country:[229]

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[223] I Sinclair *The Vienna Convention on the Law of Treaties* (Manchester University Press, Manchester, 1984) at 30.
[224] At 30-31.
[225] D Akande "International Organisations" in M D Evans *International Law* (4th ed, Oxford University Press, Oxford, 2014) 248 at 275.
[226] As it's connected to the Security Council's role in maintaining peace and security see Akande, above n 225, at 275.
[227] Murphy, above n 2, at 303; *Report of the Secretary-General on the activities of the Office of Internal Oversight Services* GA A/60/364 (2005) at [25]-[26]; "Scandal hits Ukrainian UN Troops" *BBC News* (3 September 2005) http://news.bbc.co.uk.
[228] Secretary-General Kofi Annan *Letter dated 13 April 2006 from the Secretary-General addressed to the President of the Security Council* S/2006/245 (2006).
[229] "Secretary-General Remarks at Meeting with Permanent Representatives of Troop and Police Contributing Countries on Sexual Exploitation and Abuse" (statement, New York, 17 September 2015) available <www.un.org>.

> I will not hesitate to repatriate entire contingents or terminate deployments where there are failures in command and control, evidence of widespread or systematic violations, or when Member States fail repeatedly to respond to requests for investigations or to investigate promptly.

Contributing troops to any peacekeeping operations is a voluntary act[230] associated with states' membership with the United Nations. Therefore, the removal of contingents would also be connected with membership, and within the authority of the Secretary-General. Nevertheless, it seems that the above example indicates the Secretary-General would also need to inform the Security Council, and possibly consult. Moreover, Security Council Resolution 2272 authorised the Secretary-General to remove contingents where there is a pattern of sexual exploitation and abuse.[231] This resolution supports the argument that the Security Council is the appropriate organ of the UN either to terminate MOUs or be consulted if the Secretary-General terminates.

In regards to my three underlying principles, a removal of troops as a result of the termination an MOU is somewhat unsatisfactory. Although removing contingents sent by states which have failed to exercise criminal jurisdiction over acts of sexual abuse within their ranks will remove any offenders from the host state, the international community may still not see justice being done. The removal of troops is not a guarantee or an indication that the TCC will then go on to exercise jurisdiction over perpetrators. The termination does not involve the host state, so the principle of host state ownership is not engaged with. However, if the United Nations terminates the MOU in response to a failure to exercise jurisdiction, this does send a strong signal of leadership. A withdrawal of troops would be the default

[230] R Burke *Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current Status Quo and Responsibility under International Law* (Leiden, Brill, 2014) at 264.
[231] Security Council Resolution 2272 SC Res S/Res/2272 (2016).

eventuality of termination of the MOU; however other measures may also be available, including political strategies. These will be discussed further in Chapter Five: State Responsibility.

CONCLUSION

A strong argument can be made that the Memorandum of Understanding is in fact a treaty. Evidence of an intention to conclude a treaty may be found by looking at the form of MOU; it uses treaty-like and obligatory language, it represents what the parties "agree"[232] rather than merely "decide", and its provisions reflect those commonly found in treaties, such as an "entry into force" article. The fact that an MOU has been chosen over a formal treaty structure may be due to the practical benefits of avoiding costly ratification procedures. Furthermore, subsequent behaviour and statements by UN officials suggest that, at least from the perspective of the UN, the MOU is a treaty. It is unclear how states themselves view the MOU.

Incorporation of the standards relating to sexual exploitation and abuse has been primarily achieved through the use of documents annexed to the MOU. There is a grey area associated with the legal status of the annexed materials. However, Annexes H (*We are United Nations Peacekeepers*) and F (Definitions) form part of the content of the MOU because if they were not binding then it be inconsistent with the reasons behind the Group of Legal Experts' recommendations to attach the standards to the MOU rather than the *Guidelines to Troop-Contributing Countries.*

It is similarly unclear whether art 7 *quinquiens* can be interpreted as an obligation on contributing states to exercise criminal jurisdiction. Reading the requirements of the

[232] 2007 MOU, Preamble.

"exercise of criminal jurisdiction" under the following articles of the MOU indicates that there may be obligations on TCCs to undertake certain steps but not others; TCCs may only have obligations to hand over a *prima facie* case to the appropriate national authorities and report back to the UN on outcomes (art 7 *sexiens*). These are important for increased transparency, but there is no guarantee that justice will be seen to be done as the UN cannot compel the TCC to prosecute. There is little room for UN leadership within the provisions of the MOU. It is unlikely that there are obligations on the TCC to investigate per se because if they fail to do so the UN has the ability to initiate an administrative investigation in their place under art 7 *quater*. It also appears that initiating a formal investigation, like the decision to prosecute, is considered a matter of sovereignty (at least under the MOU).

If it were assumed that art 7 *quinquiens* gave rise to a legal obligation on the contributing country to exercise criminal jurisdiction and they failed to do so, then this may be a "material breach" for the purposes of termination of the treaty/MOU. Termination would most definitely achieve the withdrawal of troops. Failure to report on outcomes would unlikely amount to a material breach.

This conclusion is rather unsatisfactory if the aim is to attach sanctions to states which fail to hold their national contingent members to account for sexual exploitation and abuse. It may be the case that allegations and investigations are indeed handed over to the national authorities but it is from there that nothing ever eventuates. Under the Memorandum of Understanding there appears to be a reluctance to interfere with sovereign rights to decide whether to prosecute (or even to initiate a formal investigation). Moreover, to get to the point of termination requires going through dispute resolution processes which are costly both in money and time. Additionally, the process relies on the will of states to engage with the dispute resolution mechanism or the Secretary-General (or the Security Council) to ultimately terminate the treaty. Although a removal of troops satisfies the principle of UN

leadership in responding to sexual exploitation and abuse, it does not mean that justice will be seen to be done. Furthermore, host state participation is absent.

CHAPTER FOUR: SEXUAL EXPLOITATION AND ABUSE – STATE OBLIGATIONS

INTRODUCTION

In this chapter I will be revisiting many of the human rights treaties that were considered in the previous part of this thesis. While in Chapter Two I limited my discussion to the concepts of sexual abuse and sexual exploitation as defined under the UN's zero-tolerance policy, in this section I will discuss state obligations in relation to treaties and norms found in international human rights law. As identified in Chapter Two, the relevant conduct for sexual exploitation and abuse has been defined as the following: "sexual abuse" as rape and sexual violence and sexual activity with children; "sexual exploitation" as survival sex, specifically where sex is exchanged for assistance that peacekeepers have access to or that the local population is already entitled to. For the purposes of this section, sexual exploitation and abuse will be considered under human rights heads of conduct that were also identified in the previous part as having the most similarity with the concepts under the SG Bulletin on sexual exploitation and abuse. Such conduct includes, torture and other cruel, inhuman or degrading treatment, prohibited sexual activities with children, and violence against women.

State obligations in which I am especially interested in relate to the exercise of criminal jurisdiction; positive obligations on states to criminalise, investigate, prosecute and punish under their domestic criminal law or codes. If the existence of independent positive obligations can be identified, then it is likely that aspects of state responsibility will arise if troop-contributing countries fail to take active steps to legislate, investigate and/or prosecute sexual exploitation and abuse (thus supporting UN sanctions or measures against TCCs).

Under human rights law there are general obligations on states to respect and ensure rights.[1] In order to implement human rights protections a state must first "respect" those rights; this translates into a negative obligation on states and their agents to refrain from taking measures that would violate those rights. A state must also "protect" individuals from violations by a third party; this includes a positive duty to put particular measures in place, legislative or otherwise,[2] in order to enshrine those rights in the domestic legal framework. A state must also "fulfil" or "ensure" its obligations under the relevant treaty to which they are a party; this is a positive duty on a state to implement relevant legislation and create a particular environment where rights are enforced.[3] This will include the obligation for the state to have in place mechanisms in which victims can apply for remedies where their rights have been violated.[4]

Thus positive duties to create a legal (criminal) framework that punishes those who violate certain rights fall under the general obligation for states to protect and ensure rights.[5] For example, the Inter-American Court of Human Rights held in the *Velasquez Rodriguez* decision that "to ensure" placed positive obligations on states to not only prevent human rights violations but also investigate and prosecute violators.[6] Additionally, the standard of "due diligence" may also be relevant, especially when examining state obligations associated with

[1] The following explanation can be referenced to R McCorquodale "Impact on State Responsibility" in M T Kamminga and M Scheinin (eds) *The Impact of Human Rights Law on General International Law* (Oxford University Press, Oxford, 2009) at 246-247.
[2] It is important to note here that some states (such as Haiti) adopt a monist approach in relation to the applicability of international treaties to their domestic legal framework; international conventions are deemed to be incorporated as domestic law upon their ratification and are "superior" where domestic laws are inconsistent see B Bookey "Enforcing the Right to be Free from Sexual Violence and the Role of Lawyers in Post-Earthquake Haiti" (2011) *CUNY Law Review* 271 at 276; see also M Shaw *International Law* (6th ed, Cambridge University Press, Cambridge, 2008) at 131-133.
[3] B G Ramcharan *The Fundamentals of International Human Rights Treaty Law* (Martinus Nijhoff, Boston, 2011) at 17.
[4] At 18.
[5] T Buergenthal "To Respect and to Ensure: State Obligations and Permissible Derogations" in L Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (Cambridge University Press, New York, 1981) at 77; A Seibert-Fohr *Prosecuting Serious Human Rights Violations* (Oxford University Press, Oxford, 2009) at 264.
[6] *Velasquez Rodriguez v Honduras (Judgment)* (1989) Inter-American Court of Human Rights (Ser C) No 42 at [166]-[167].

violence against women. The due diligence standard refers to the steps states should take to fulfil their responsibility to respond to acts to violence against women including to investigate and prosecute such violence.[7]

(A) EXTRATERRITORIAL JURISDICTION

The question as to whether human rights norms apply to peacekeepers and what obligations arise for states as a consequence is an important and growing area of academic interest.[8] It has been asserted that, for policy reasons, human rights obligations of states should devolve to all peacekeeping personnel, particularly military contingent members.[9] This can be supported by inspecting the Security Council mandates that create or extend peacekeeping operations; for example, in many instances the Council has signified the importance of protecting civilians against abuses of human rights and violations of humanitarian law "including all forms of sexual and gender-based violence".[10] Moreover, military personnel should be considered employees or agents of the state.

In regard to extraterritorial jurisdiction, a state may well be responsible at international law for alleged human rights violations *vis a vis* the actions of their military personnel. What I am interested in is the related question of whether a state is required to assert jurisdiction over sexual exploitation and abuse that are considered "crimes" committed by military members acting abroad. As a matter of principle states are permitted to assert jurisdiction over offences

[7] Committee on the Elimination of All forms of Discrimination against Women *General Recommendation 19* CEDAW/C/GC/19 (1992) at [9]; Committee on the Elimination of All forms of Discrimination against Women *General Recommendation 28* CEDAW/C/GC/28 (2010) at [19].
[8] See for example K M Larsen *The Human Rights Treaty Obligations of Peacekeepers* (Cambridge University Press, Cambridge, 2012).
[9] Primarily because military contingent members can be considered "state actors" or "agents" see Larsen, above n 8, at 5, 11 and 13.
[10] See *Security Council Resolution 2098 extending the mandate of MONUSCO* SC S/Res/2098 (2013) at [12(iii)]; see also *Security Council Resolution 2100 establishing the United Nations Multidimensional Integrated Stabilisation Mission in Mali (MINUSMA)* SC S/Res/2100 (2013) at [24] and [34]; *Security Council Resolution 2113 extending the mission mandate for African Union/United Nations Hybrid Operation in Darfur* SC S/Res/2113 (2013) at [17]-[18].

committed outside their territory on the basis that the offender is a national.[11] Whether states are required to do so under human rights law will be investigated. For the opportunity of transparency and for victims to see justice being done, such extraterritorial jurisdiction should be asserted.

(B) International Human Rights Obligations

I will focus on international human rights law in this chapter. The human rights framework applies in both peacetime and during conflict.[12] This is advantageous because although peacekeepers may at times be operating during armed conflict, it is unlikely they will be considered combatants continually for the application of humanitarian law (which may also provide state obligations to respond to crimes committed by their troops during armed conflict).[13] Additionally, individuals are rights-holders under the international human rights framework which mean states have an obligation to protect and respond to rights violations committed by both state and non-state actors.[14] This is beneficial to apply in the context of peacekeeping because of the opportunistic nature of survival sex, which is unlikely fall within the scope of official state actions.[15] Nevertheless, states may still be obligated to respond to abuse under human rights law. Therefore, the human rights framework is a useful tool to articulate state obligations to respond to survival sex committed by peacekeepers.

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[11] C Ryngaert *Jurisdiction in International Law* (Oxford University Press, Oxford, 2008) at 88.

[12] *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*, ICJ Reports 1996, 226 at [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion*, ICJ Reports 2004, 178 at [106].

[13] The question of whether and when international humanitarian law applies to UN peacekeepers has been discussed elsewhere see for example, R Murphy "United Nations Military Operations and International Humanitarian Law: What Rules to Apply to Peacekeepers?" (2003) 14 *Criminal Law Forum* 153; Saura "Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations" (2006-2007) 58 *Hastings Law Journal* 479; Shraga "UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage" (2000) 94 *The American Journal of International Law* 406; see also United Nations Secretary-General's Bulletin *Observance by UN Forces of International Humanitarian Law* SG B ST/SGB/1999/13 (2006).

[14] Alston and Goodman *International Human Rights* (Oxford University Press, Oxford, 2013) at 58-59.

[15] R Burke *Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current Status Quo and Responsibility under International Law* (Leiden, Brill, 2014) at 331.

This chapter will explore state obligations relating to particular conduct under human rights law which correspond to sexual abuse and sexual exploitation; these include torture and other cruel, inhuman or degrading treatment (sexual abuse); sexual activity with children (sexual abuse); and violence against women (sexual exploitation). To achieve this, various international human rights instruments will be examined. Additionally, this chapter addresses whether states are expected to assert extraterritorial jurisdiction in relation to these categories.

(1) Torture and Other Cruel, Inhuman or Degrading Treatment

Rape and sexual violence have been treated as torture and/or inhuman treatment by a number of international human rights mechanisms, such as the Committee for the Convention against Torture (CAT),[16] the Inter-American Commission on Human Rights,[17] and the European Court of Human Rights.[18] Furthermore, positive duties have been identified by such bodies which include the obligation on states to conduct effective investigations into acts of torture.[19]

For this heading it is useful to take developments under the *International Covenant on Civil and Political Rights* (ICCPR) as an opening example.[20] The ICCPR is one of nine United Nations human rights instruments and its implementation by states parties is reviewed every

[16] Based on article 1, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987): [CAT]; Committee against Torture *V L v Switzerland* Commission No. 262/2005, CAT/37/D/262/2005 (2007). See also Concluding Observations by the Committee which has addressed rape and sexual violence generally as violence against women under the Convention's definitions of torture (art 1) and cruel, inhuman or degrading treatment (art 16) examples: Committee against Torture *Concluding Observations on the combined fifth and sixth periodic reports of Peru, adopted by the Committee at its forty-ninth session* CAT/C/PER/CO/5-6 (2013) at [14]; Committee against Torture *Concluding Observations of the Committee against Torture: Ghana* CAT/C/GHA/CO/1 (2011) at [22].

[17] Based on the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women [Convention of Belém do Pará]* (opened for signature 9 June 1994, entered into force 5 March 1995).

[18] Based on article 3, *European Convention for the Protection of Human Rights and Fundamental Freedoms* ETS 3 (opened for signature 14 November 1950, entered into force 3 September 1953); see also *Aydin v Turkey* (1998) 25 EHRR 251 (ECHR).

[19] *MC v Bulgaria* (2005) 40 EHRR 20 (ECHR) at [149]-[153].

[20] *International Covenant on Civil and Political Rights* 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976): [ICCPR].

four years by the Human Rights Committee (HRC).[21] As such, the HRC not only monitors implementation but also interprets the provisions of the ICCPR.

The HRC has interpreted obligations under art 2 so as to include a duty on states to bring those responsible for human rights violations "to justice".[22] However, these words do not strictly refer to punishment in criminal law. Instead the interpretation of "justice" changes depending on the nature of the right violated.[23] Generally, how violators are brought to justice is left to the discretion of states parties.[24] However, the HRC has noted that only criminal punishment may suffice in certain circumstances, for example, for acts of torture.[25] To "make remedies effective" in terms of art 2, the Human Rights Committee has signified the importance of investigation.[26] This line of reasoning has been applied to all forms of "serious human rights violations", which again includes torture.[27]

However, as will be seen below, recent observations by the HRC suggest that serious sexual harm caused to women will also require states to investigate in order to bring violators "to justice" in terms of art 2. The HRC has called on states to investigate serious forms of sexual exploitation against women, which would satisfy the definitions of both "sexual abuse" and "sexual exploitation" under the SG Bulletin.[28]

[21] ICCPR, arts 28 and 40-42.
[22] Human Rights Committee *Minanga v Zaire* Communication No. 366/1989, CCPR/C/49/D/366/1989 (1993) at [7].
[23] Seibert-Fohr, above n 5, at 13.
[24] At 13.
[25] Human Rights Committee *General Comment No 31: The nature of the general legal obligation imposed on States Parties to the Covenant* CCPR/C/21/Rev.1/Add.13 (2004): [HRC General Comment No 31] at [16] and [18].
[26] Seibert-Fohr, above n 5, at 35; Human Rights Committee *General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* Adopted at the Forty-fourth Session (1992): [HRC General Comment No 20] at [11]-[12].
[27] HRC General Comment No 20, above n 26, at [11]-[12].
[28] See for example Human Rights Committee *Concluding Observations on the third periodic report of Paraguay, adopted by the Committee at its 107th session* CCPR/C/PRY/CO/3 (2013) at [12].

According to the HRC, upon a positive outcome of investigation adequate punishment is required which may imply a duty to prosecute.[29] Moreover, the Committee has indicated in its General Comments and in various Concluding Observations that prosecution and punishment (following a conviction) is indeed expected in cases of torture.[30] In sum, for states to fulfil their obligations under arts 2 and 7 (torture) of the ICCPR states must criminalise, investigate, prosecute and punish acts of torture, inhuman or degrading treatment. Similar findings have been made under regional instruments such as the *Inter-American Convention on Human Rights*[31] and the *European Convention on Human Rights*.[32] The Committee against Torture considered domestic prosecution of the acts described in arts 1 and 16[33] under the C*onvention against Torture* as essential for protection.[34] Asserting extraterritorial jurisdiction over torture crimes is also expected where military members operate abroad.[35]

According to the Committee against Torture's *General Comment No 2*, a failure by the state to exercise due diligence to investigate, prosecute and punish acts of torture committed by state

[29] Seibert-Fohr, above n 5, at 46.
[30] Human Rights Committee *Concluding Observations on the initial Report of Indonesia* CCPR/C/IDN/CO/1 (2013) at [14]; Human Rights Committee *Concluding Observations Kuwait* CCPR/C/KWT/CO/2 (2011) at [16]; HRC General Comment No 20, above n 26, at [14].
[31] Based on art 5(2): *American Convention on Human Rights "Pact of San Jose, Costa Rica"* OAS (opened for signature 22 January 1969, entered into force 18 July 1978).
[32] Torture is considered a serious violation of human rights and fundamental values under the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, above n 17, and as such will require criminalisation and enforcement of the criminal law: see *HR and Mohammed Momani v The Federation of Bosnia and Herzegovina (admissibility)* (1999) Human Rights Chamber of Bosnia and Herzegovina Case No. CH/98/946 at [112] and[146]-[147]; *Oneryildiz v Turkey (judgment)* (2002) no. 48939/99 (ECHR) at [109]; Seibert-Fohr, above n 5, at 113-115.
[33] CAT, art 1 is included in-text below and art 16(1) reads: "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment."
[34] Based on CAT, arts 1, 2, 12 and 16 see for example, Committee against Torture *Concluding Observations on the combined fifth and sixth periodic reports of Guatemala adopted by the Committee at its fiftieth session* CAT/C/GTM/CO/5-6 (2013) at [13(b)]; Committee against Torture *Concluding Observations on the second periodic report of the Plurinational State of Bolivia as approved by the Committee at its fiftieth session* CAT/C/BOL/CO/2 (2013) at [15a)]; , Committee against Torture *Concluding Observations of the Committee against Torture: Sri Lanka* CAT/C/LKA/CO/3-4 (2011) at [22].
[35] See CAT, art 7(1); HRC General Comment No 31, above n 25, at [80]; Seibert-Fohr, above n 5, at 159.

or private actors will be a breach of their obligations under CAT and the state will bear consequential responsibility.[36] It is important to be aware, however, that there are specific requirements for the definition of "torture" which may not be met in all instances of sexual exploitation and abuse in the peacekeeping context.

Article 1 of CAT defines torture as the following:

> … "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed or intimidating or coercing him or a third person or for any other reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The requirement of "severe pain or suffering" is a high threshold.[37] However, rape has been held to meet this requirement in circumstances where women were systematically and repeatedly raped by military forces.[38] Often it is dependent on the circumstances such as the duration of the act/s, the effects both mentally and physically, and the individual victim.[39] A second requirement is that the infliction is for one of the prohibited purposes listed in art 1. Additionally, if rape or sexual violence is used to "punish, intimidate and humiliate" or is otherwise directed towards a woman because she is a woman (discrimination) then these will

[36] Committee against Torture *General Comment No 2: Implementation of Article 2 by States Parties* CAT/C/GC/2 (2008) at [18].
[37] K Fortin "Rape as Torture: An Evaluation of the Committee against Torture's attitude to Sexual Violence" (2008) 4 *Utrecht Law Review* 145 at 149.
[38] *V L v Switzerland*, above n 16.
[39] *Moldovan v Romania* [2003] ECHR 485, at [100] regarding article 3 of the *European Convention for the Protection of Human Rights.*

be considered "prohibited purposes" under the Convention.[40] The third relevant requirement is that the acts are committed by a public official or with consent or acquiescence of the public official.

Members of military contingents can be considered "state actors".[41] Moreover, military forces have been considered public officials for the purposes of CAT.[42] Rape and sexual violence will meet the required severity threshold.[43] It is uncertain whether all forms of sexual exploitation would also meet the threshold. In cases where rape has been considered "severe pain or suffering" the circumstances involved systematic or multiple rapes of women detained by the state.[44] However, these cases have been used by academics to support the general proposition that single acts of sexual violence or rape will nevertheless be "torture" where the other requirements are met.[45] Moreover, if sexual exploitation and abuse by peacekeepers is not found to meet the threshold of severity under art 1 but the other requirements are present, then such conduct may be considered cruel or other degrading treatment under art 16. In these cases the obligations on states to investigate and prosecute will still apply.[46] It is also interesting to note that in its Concluding Observations the Committee against Torture does not only address rape and sexual violence as acts that would fulfil the definitions of torture (or cruel, inhuman or

[40] N S Rodley *Question of the Human Rights of All Persons Subjected to any form of Detention or Imprisonment, in particular: Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* E/CN.4/1994/31 (1994) at [431]; *Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo (Judgment)* ICTY Trial Chamber IT-96-21-T, 16 November 1998 at [493].
[41] See Larsen, above n 8, at 5, 11 and 13.
[42] See *Raquel Marti de Meja v Peru* (1996) Inter-American Commission on Human Rights, Report 5/96, Case 10. 970.
[43] See *Raquel Marti de Meja v Peru,* above n 24.
[44] See discussion Fortin, above n 37, at 149-150.
[45] See for example, Fortin, above n 37; J Marshall "Positive Obligations and Gender-based Violence: Judicial Developments" (2008) 10 *International Community Law Review* 143 at 146; D S Mitchell "The Prohibition of Rape in International Humanitarian Law as a Norm of *jus cogens:* Clarifying the Doctrine" (2004-2005) 15 *Duke Journal of Comparative and International Law* 219 at 251-256; N Ousman *Contribution of the Special Court for Sierra Leone to the Development of International Humanitarian Law* (Duncker & Humlot, Berlin, 2013) at 117-118.
[46] See CAT, art 16.

degrading treatment), but addresses violence against women generally.[47] This approach would seem to support the assertion that forms of sexual exploitation may be considered torture/cruel, inhuman treatment.

In sum, it is likely that some forms of sexual exploitation and abuse will fall within the definition of torture or cruel, inhuman or degrading treatment, provided the particular requirements are met in an individual case; ie where sexual exploitation and abuse is used by military contingent members to humiliate the victim or is otherwise used against the victim because she is a woman (discrimination). It is unlikely that opportunistic acts of sexual exploitation will strictly fulfil the "prohibited purpose" requirement. However, it will depend on the circumstances and indeed it is arguable that in some cases such opportunistic acts of sexual abuse may nevertheless be committed with a prohibited purpose. In these circumstances the obligation on troop-contributing countries under the ICCPR, CAT or relevant regional treaty to investigate and prosecute will apply.

(2) SEXUAL ACTIVITY WITH CHILDREN

Sexual activity with children (including child prostitution) is "sexual abuse".[48] This category is important because 35% of substantiated cases of sexual abuse involve victims under 18 years old, which the SG Bulletin has defined as "children".[49] As such, this section explores obligations on states to investigate and prosecute for such activity.

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[47] See for example, *Concluding observations on the combined fifth and sixth periodic reports of Guatemala,* above n 34, at [13]; *Concluding observations on the second periodic report of the Plurinational State of Bolivia,* above n 34, at [15].

[48] As concluded in Chapter Two: What is Sexual Abuse and Sexual Exploitation?

[49] The Secretary-General noted that although in 2014 thrifty-five percent of sexual abuse allegations involved minors, that category made up fifty percent of allegations from 2010-2013: Secretary-General *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* GA at A/69/779 (2015) at [20]. See also Secretary General *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* GA A/66/699 (2012); Secretary-General *Special Measures for the Protection from Sexual Exploitation and Abuse GA* A/68/756 (2014); Secretary-General *Special Measures for the Protection from Sexual Exploitation and Abuse* GA A/67/766 (2013); United Nations Secretary-General's Bulletin *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* SG B ST/SGB/2003/13 (2003) [S-G Bulletin (2003)] at [3.2(b)].

The *Convention on the Rights of the Child* (CRC), one of the UN's core human rights treaties, is specifically relevant here.[50] The CRC primarily focuses on preventative measures rather than punishment. A relevant example of this preventative approach is seen in art 34.[51] The provision places a duty on states to implement preventative measures to guard against the sexual exploitation of children through prostitution. Explicit obligations involving state enforcement against rights-abusers are limited to art 32 which concerns exploitation of children in employment. The wording of art 32 is similar to art 10(3) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) with references made to protection from exploitative work that may negatively interfere with the "child's health or physical, mental, spiritual, moral or social development".[52] It is arguable that such phrasing could include child prostitution or sex work; one example would be that child prostitution exposes children to the increased possibility of contracting HIV which is a major health risk.[53] Moreover, art 10 of ICESCR has been interpreted widely as comprising violence against children, including sexual abuse or exploitation.[54] Concluding Observations of the Committee on the Rights of the Child reveal a similar interpretation of the CRC, implying a duty on states parties to protect children from all forms of sexual exploitation and abuse.[55]

[50] *Convention on the Rights of the Child* 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990): [CRC].
[51] See CRC art 2(2) "States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment..."
[52] *International Covenant on Economic, Social and Cultural Rights* 993 UNTS 3 (opened for signature 18 December 1979, entered into force 3 September 1981): [ICESCR].
[53] See for example B M Willis and B S Levy "Child Prostitution: Global Health Burden, Research Needs, and Interventions" (2002) 359 *The Lancet: Public Health* 1417.
[54] See for example, Committee on Economic, Social and Cultural Rights *Concluding Observations on the combined third and fourth periodic reports of Jamaica adopted by the Committee at its fiftieth session* E/C.12/JAM/CO/3-4 (2013) at [20]; Committee on Economic Social and Cultural Rights *Concluding Observations on the initial to third reports of the United Republic of Tanzania adopted by the Committee at its forty-ninth session* E/C.12/TZA/CO/1-3 (2012) at [13].
[55] See for example, Committee on the Rights of the Child *Concluding Observations: Guinea-Bissau* CRC/C/GNB/CO/2-4 (2013) at [38]-[39]; Committee on the Rights of the Child *Concluding Observations: Afghanistan* CRC/C/AFG/CO/1 (2011) at [71(e)]; Committee on the Rights of the Child *Concluding Observations: Montenegro* CRC/C/MNE/CO/1 (2010) at [67].

The obligations for states parties under the CRC's art 32 provides that:

> 2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. ... States Parties shall in particular:
>
> ...
>
> (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

The provision requires states to make the necessary changes to their national law to incorporate penalties for the exploitation of children in employment. The article does not explicitly provide for states to investigate and prosecute offenders. However, according to the Committee on the Rights of the Child, states are nevertheless expected to actively respond to sexual exploitation and abuse of children that occur within their territory.[56] Positive steps expected from states parties will include exercising their criminal jurisdiction over violators.[57] In sum, buying sex from child prostitutes in the peacekeeping context would seem to require positive action from the troop-contributing country, such as investigation and prosecution under art 32 of the CRC. Arguably, states that do not react to such abuse in the prescribed ways will breach the spirit of the CRC.

[56] See for example, Committee on the Rights of the Child *Concluding Observations: Rwanda* CRC/C/RWA/CO/3-4 (2013) at [30]; Committee on the Rights of the Child *Concluding Observations: Slovenia* CRC/C/SVN/CO/3-4 (2013) at [42].

[57] Such as to "prohibit all violence against children" and "take measures to prosecute perpetrators of sexual exploitation of children" see examples *Concluding Observations: Rwanda*, above n 56, at [30(a)]; *Concluding Observations: Afghanistan*, above n 70, at [71(e)]; *Concluding Observations: Montenegro* above n 55, at [38(a)(i)].

Additionally, the *Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography* (OP-SC)[58] seeks to expand the duties under a number of the CRC's provisions in certain areas, including arts 32 and 34. The OP-SC focuses on the criminalisation and enforcement of certain offences. As this OP is specific to child prostitution it is relevant to examine for obligations on states to investigate and prosecute.

The sale of children, child prostitution and child pornography are offences under the Optional Protocol, bringing the relevant rights under the CRC into the realm of transnational criminal law.[59] The definition of child prostitution is most relevant; art 2 states that "child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration". Article 3 develops the definition further by requiring states to make the following an offence under their domestic criminal law in relation to child prostitution: "the offering, obtaining, procuring or providing a child for child prostitution as defined in article 2".[60] In fulfilment of their obligations under the OP-SC, states are expected to assert extraterritorial jurisdiction over these offences.[61]

The Protocol itself does tend to focus on the movement of children for the stated purposes rather than on those who buy sex from child prostitutes, being primarily influenced by state obligations to prevent the transnational trafficking of children and child pornography.[62] The requirement to criminalise certain conduct implies that states parties should also actively

[58] *Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography* 2171 UNTS 227 (opened for signature May 25 2000, entered into force January 18 2002): [OP-SC].
[59] See OP-SC, arts 2-3.
[60] At art 3(1)(b).
[61] Committee on the Rights of the Child *Consideration of reports submitted by States Parties under article 12. Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Children on the Sale of Children, child prostitution and child pornography, Concluding Observations: Argentina* CRC/C/OPSC/ARG/CO/1 (2010) at [32]; Committee on the Rights of the Child *Consideration of reports submitted by States Parties under article 12. Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Children on the Sale of Children, child prostitution and child pornography, Concluding Observations: Colombia* CRC/C/OPSC/COL/CO/1 (2010) at [25].
[62] See generally United Nations Children's Fund *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child pornography* (Innocenti Research Centre, Florence, 2009).

investigate and prosecute/penalise offenders.[63] Additionally, the Third World Congress against Sexual Exploitation of Children and Adolescents in 2008 noted that in order to implement the Optional Protocol states were urged to address the issue of demand by criminalising the buying of sex from children.[64] Being "urged" is perhaps the strongest language that can be used without a legally binding consequence. The act of buying sex from children is of most concern under the SG Bulletin's prohibitions, rather than who is supplying the children. Thus, the above seems to suggest positive action is required from TCCs to criminalise buying sex from child prostitutes (and by implication extend their jurisdiction in order to cover their peacekeeping personnel acting abroad).

However, upon examining the work of the Committee on the Rights of the Child, it seems that addressing demand in criminal law is not generally expected from states parties.[65] Instead, emphasis has been placed on education and research in identifying the causes of child prostitution and trafficking.[66] Moreover, the Special Rapporteur on the Sale of Children has urged states to address demand by implementing awareness-raising measures, rather than through criminalisation.[67] In sum, there seems to be no general or explicit duty stemming from the OP-SC for states to criminalise, investigate and/or prosecute the purchase of sex from child prostitutes. Nevertheless, child prostitution (as well as other forms of sexual activity with

[63] This was also supported by several statements to this effect in the Third World Congress against Sexual Exploitation of Children and Adolescents *The Rio de Janeiro Declaration and Call for Action to Prevent and Stop Sexual Exploitation of Children and Adolescents* (2008) at Preamble [4] and [A13].
[64] At [C14].
[65] See for example, Committee on the Rights of the Child *Concluding Observations on the initial report of Paraguay submitted under article 12 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted by the Committee at its sixty-fourth session* CRC/C/OPSC/PRY/CO/1 (2013) at [23(b)]; Committee on the Rights of the Child *Concluding Observations on the initial report of Burkina Faso submitted under article 12 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted by the Committee at its sixty-second session* CRC/C/OPSC/BFA/CO/1 (2013) at [25].
[66] *Concluding Observations on the initial report of Paraguay,* above n 65, at [23]; *Concluding Observations on the initial report of Burkina Faso,* above n 66, at [25].
[67] See *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, Najat Maalla M'Jid* A/HRC/22/54 (2012) at [95(b)]; see also the General Assembly Resolution which urges states to address the demand for child prostitution and trafficking without explicitly referring to criminal measures: *General Assembly Resolution on the Rights of the Child* GA Res A/RES/66/141 (2012) at [20].

children) does fall into the general category of sexual exploitation and abuse as defined by the Committee under the CRC itself.[68]

Like the ICCPR, the CRC has a "respect and ensure" provision.[69] As such, it is arguable that in order to ensure those relevant rights under the CRC (notably arts 32 and 34) states would need to address the demand side of child prostitution and pursue individuals that sexually exploit children. One of the steps states could take to respect and ensure these rights is to criminalise, investigate and ultimately punish those activities. Furthermore, this is supported by several statements made by the Commission, detailing the need to criminalise violence against children, which includes all forms of sexual abuse and exploitation.[70]

Although there may be an obligation on states to enact legislation and enforce certain offences in their domestic criminal law regarding sexual activity with children, there may still be issues addressing these obligations across troop-contributing countries in the context of peacekeeping. While the CRC is almost universally ratified, there are a significant number of reservations. Many states parties also have wide discretion in relation to the age of legal maturity, as seen in art 1 of the CRC therefore undermining the SG Bulletin's definition of maturity at 18 years old.[71] However, a counterargument could be that many of the provisions of the CRC are considered customary international law. Being customary the view would be that the CRC's provisions/obligations will nevertheless apply across all TCCs. Nonetheless, as noted above, there are a number of reservations to this treaty, and so those states that are "persistent

[68] See for example, Commission on the Rights of the Child *Concluding Observations on the combined third and fourth periodic report of Canada adopted by the Committee at its sixty-first session* CRC/C/CAN/CO/3-4 (2012) at [49(b)]; *Concluding Observations: Montenegro,* above n 55, at [38(a)].
[69] See CRC, art 2(1).
[70] See above n 55 and accompanying text.
[71] "For the purposes of the present Convention, a child means every human being below the age of eighteen years *unless under the law applicable to the child, majority is attained earlier*" [emphasis added] CRC, art 1.

objectors" would not be bound by those provisions in which they have a reservation in place. Thus, the CRC's customary status cannot be fully relied upon to bind all TCCs to its provisions.

Unlike the OP-SC, the CRC itself is silent on the issue of asserting jurisdiction over crimes such as violence against children or sex offences committed abroad. Such an interpretation is deplorable when considering the perspective of victims and their communities, as host state jurisdiction has been waved under the SOFA there is total reliance on TCCs to respond to sexual abuse of children committed by their military personnel. If TCCs do not assert jurisdiction and are not required to do so under the CRC then this is an unacceptable gap. However, arguably, in order to adhere to the obligation to "respect and ensure" rights under the Convention it would be necessary for states to assert extraterritorial jurisdiction over acts of violence against children. The lack of extraterritorial jurisdiction for child sexual exploitation and abuse is perhaps the current situation for many TCCs and this could in fact be a breach of the CRC respect and ensure provision.

(3) VIOLENCE AGAINST WOMEN

The concept of violence against women can encompass both "sexual abuse" and "sexual exploitation". Violence against women includes rape and sexual violence, and sexual exploitation of women generally. Violence against women is addressed in several specific international instruments, such as the Committee on the Elimination of Discrimination against Women's *General Recommendation 19,*[72] based on art 1 of the *Convention on the Elimination of Discrimination against Women* (CEDAW).[73] In addition, both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have included violence against women generally in their Observations on the respective Covenants. Duties on states to actively

[72]Above n 7.
[73] *Convention on All forms of Elimination of Discrimination against Women* 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981): [CEDAW].

address violence against women have been connected to rights under art 10 of ICESCR (protection of women and children)[74] and art 7 of ICCPR (torture and inhuman treatment).[75] In order to fulfil obligations under these articles, coupled with art 2 of both Covenants, states are required to criminalise certain aspects of violence against women (primarily rape, marital rape and domestic violence), to investigate all complaints of violence and prosecute and punish offenders.[76]

Article 4(c) of the General Assembly's 1993 Declaration on the Elimination of Violence against Women[77] provides that states should "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons". Subparagraph (d) goes on to say that states should "develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence". Importantly, neither provision explicitly requires the development of legislation to pursue perpetrators of violence against women exclusively in criminal law. The Declaration defers to existing domestic arrangements of states. In subparagraph (d) states are given a range of options to punish perpetrators, of which punishment in criminal law is only one. This seems to go to the status of the Declaration as a non-binding instrument – it cannot strictly require states to do anything. Nonetheless, the Declaration is currently one of the only official UN instruments that refer to state obligations related to violence against women explicitly.

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[74] See for example, Committee on Economic, Social and Cultural Rights *Concluding Observations on the third periodic report of Azerbaijan, adopted by the Committee at its fiftieth session* E/C.12/AZE/CO/3 (2013) at [18]; Committee on Economic, Social and Cultural Rights *Concluding Observations of the Committee on the third report of Ecuador as approved by the Committee at its forty-ninth session* E/C.12/ECU/CO/3 (2012) at [21].

[75] See for example, Human Rights Committee *Concluding Observations of the Human Rights Committee: Cape Verde* CCPR/C/CPV/CO/1 (2012) at [9]; Human Rights Committee *Concluding Observations of the Human Rights Committee: Dominican Republic* CCPR/C/DOM/CO/5 (2012) at [11].

[76] For example see, Human Rights Committee *Concluding Observations on the fifth periodic review of Peru, adopted at its 107th Session* CCPR/C/PER/CO/5 (2013) at [10]; *Concluding Observations on the initial to third reports of the United Republic of Tanzania*, above n 55, at [13].

[77] *United Nations Declaration on the Elimination of Violence against Women* GA Res A/RES/48/104 (1993).

In terms of other non-binding instruments under this heading, the Beijing Declaration and Platform for Action are also relevant.[78] These documents emerged from the UN's Fourth World Conference on Women in 1995, which looked at *inter alia* steps governments could take to eliminate violence against women. Although the Platform for Action was adopted by the General Assembly, it is not regarded as a legally binding document. Rather, the Platform is of political importance only. As part of the measures that should be taken by governments to eliminate violence against women, paragraph 124 of the Platform details that states should:[79]

> ... exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women ...
>
> Enact and/or reinforce penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs done to women and girls who are subjected to any form of violence.

As the Platform represents the collective consensus of many states, it defers to state discretion as to how violence against women is sanctioned and redressed, reflecting the compromise made to gain consensus across many different governments.

The General Assembly's special session to review the implementation of these political documents strongly supports the development of legislation or other laws to make violence against women and girls punishable under domestic criminal law.[80] The special session refers specifically to gendered violence as a criminal offence representing a shift away from the

[78] Fourth World Conference on Women *Beijing Declaration and Platform for Action* A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995): [Platform for Action].
[79] Platform for Action, above n 78, at 124(b)-(c).
[80] See at General Assembly Resolution *Further actions and initiatives to implement the Beijing Declaration and Platform for Action GA Res* A/RES/S-23/3 (2000) [66(c)]-[66(d)].

language of the Platform itself, which deferred to state discretion. However, like the Platform, this later document is still of political influence rather than law.

The Committee on the Elimination of Discrimination against Women's *General Recommendation 19* provides that violence against women is a form of discrimination under art 1 of CEDAW.[81] As such, art 2 provides that states must *inter alia* "adopt appropriate legislative and other measures including sanctions where appropriate, prohibiting all discrimination against women".[82] Moreover, *General Recommendation 28* expands on state obligations under the Convention and notes that "[s]tates parties have a due diligence obligation to prevent, investigate, prosecute and punish such acts of gender based violence".[83] These duties are also reflected in the jurisprudence of the Committee and many of its Concluding Observations.[84] The Committee has however only required criminalisation of certain acts of violence, such as rape, and domestic violence (a similar approach as is taken under the ICCPR and ICESCR).[85] States thus have discretion on the type of sanction to attach to other forms of

[81] *General Recommendation 19*, above n 7, at [6].
[82] CDEAW, art 2(b) see also art 2(e).
[83] Committee on the Elimination of Discrimination Against Women *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women* CEDAW/C/2010/47/GC.2 (2010) at [19].
[84] Committee on the Elimination of Discrimination against Women *Angela González Carreño v Spain* CEDAW/C/58/D/47/2012 Communication No 47/2012 (2014) at [9.7] and [11(b)(ii); Committee on the Elimination of Discrimination against Women *Banu Akbak, Gülen Khan and Melissa Őzdemir v Austria* CEDAW/C/39/D/6/2005 Communication No 6/2005 (2007) at [12.1.2] and [12.3(a)]; Committee on the Elimination of Discrimination against Women *Hakan Goekce, Handan Goekce and Guelue Goekce v Austria* CEDAW/C/39/D/5/2005 Communication No 5/2005 (2007) at [12.3(a)]; Committee on the Elimination of Discrimination against Women *S V P v Bulgaria* CEDAW/C/53/D/31/2011 Communication No 31/2011 (2012) at [9.3]; Committee on the Elimination of Discrimination against Women *V K v Bulgaria* CEDAW/C/49/D/20/2008 Communication No 20/2008 (2011) at [9.3]; Committee on the Elimination of Discrimination against Women *Concluding Observations on the Combined initial and second periodic reports of Afghanistan* CEDAW/C/AFG/CO/1-2 (2013) at [23(a)]; Committee on the Elimination of Discrimination against Women *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Israel* CEDAW/C/ISR/CO/5 (2011) at [23(a)]; Committee on the Elimination of Discrimination against Women *Concluding Observations of the Committee on the Elimination of Discrimination against Women: South Africa* CEDAW/C/ZAF/CO/4 (2011) at [31(c)].
[85] See for example, Committee on the Elimination of Discrimination against Women *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Côte d'Ivoire* CEDAW/C/CIV/CO/1-3 (2011) at [30]; Committee on the Elimination of Discrimination against Women *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Kuwait* CEDAW/C/KWT/CO/3-4 (2011) at [31(b)].

violence against women, such as administrative sanctions. However, when states have criminalised violence against women generally, the Committee has treated this favourably.[86]

In its Concluding Observations on Côte d'Ivoire in 2011, the Committee explicitly referred to the context of peacekeeping.[87] At that time there were a number of suspected cases of sexual exploitation and abuse committed by members of the United Nations Operation in Côte d'Ivoire (UNOCI).[88] Allegations included the sexual abuse of children.[89] The CEDAW Committee requested that the UN ensure the return of those suspected of sexual exploitation and abuse to their respective troop-contributing countries "with the request to initiate domestic investigations and prosecutions".[90] This statement suggests that those acts of sexual exploitation and abuse (violence against women) committed by those military members were (or should have been) within the criminal jurisdiction of the TCC. Moreover, that criminal sanction in particular was expected. As such, this strengthens the argument that violence against women in the form of sexual exploitation and abuse in peacekeeping ought to be criminalised. Whether criminalisation of sexual exploitation and abuse is actually an obligation under the provisions of CEDAW is not so clear.

As noted above, specific mention of a duty to criminalise has been reserved for forms of violence against women the Committee considers "serious", such as rape. In the peacekeeping context this would cover "sexual abuse" but not necessarily "sexual exploitation". A similar conclusion can be found in the approach taken by regional treaties, such as the *Inter-American*

[86] See for example, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: South Africa,* above n 84, at [25].
[87] *Concluding Observations of the Committee of the Elimination of Discrimination against Women: Côte d'Ivoire,* above n 85.
[88] At [29(b)].
[89] See for example, "Cote d'Ivoire: UN Responding to Allegations of Sexual Abuse by Peacekeepers" (1 September 2011) UN News Centre www.un.org.
[90] *Concluding Observations of the Committee of the Elimination of Discrimination against Women: Côte d'Ivoire,* above n 85, at [29(b)].

Convention on the Prevention, Punishment and Eradication of Violence against Women,[91] the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*,[92] and *The Council of Europe Convention on Preventing and combating violence against Women and Domestic Violence*.[93]

(A) DUE DILIGENCE

As discussed above, there are many treaties and instruments that refer to the "due diligence" standard. The Inter-American Court of Human Rights noted in *Velasquez Rodriguez* that: "The state has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out serious investigations ... to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation".[94] Similarly, the Inter-American Commission on Human Rights has further reiterated the due diligence standard noting that states have an obligation to conduct good faith investigations into acts of violence against women (the standard also requires investigations to be prompt, impartial and exhaustive).[95]

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[91] See Convention of *Belém do Pará*, art 7(b): "The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to: ... apply due diligence to prevent, investigate and impose penalties for violence against women". See also art 7(c).

[92] See *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women* (opened for signature 11 July 2003, entered into force 25 November 2005) art 4(b) which requires stats parties to "adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women". See also See African Commission on Human and People's Rights *Social and Economic Rights Action (SERAC) and Another v Nigeria* Communication 155/96 (2001).

[93] See *Council of Europe Convention on Preventing and combating violence against Women and Domestic Violence* CETS No: 210 (entered into force 11 May 2011) art 1(1)(a) see also art 5 with reference to due diligence and art 49(2) general obligations. See also arts 36, 37, 38, 39 and 40.

[94] *Velasquez Rodriguez*, above n 6, at [172].

[95] *Lenahan (Gonzales) v United States of American* (2011) Inter-American Commission on Human Rights Case 12.626, Report 80/11; see for discussion A J Sennett "*Lenahan (Gonzales) v United States of America:* Defining Due Diligence?" (2012) 53 *Harvard International Law Journal* 538; *da Penha Maia Fernandes v Brazil* (2001) Inter-American Commission on Human Rights Case 12.051, Report 54/01; see for discussion R M Celorio "The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standards-Setting" (2001) 65 *University of Miami Law Review* 819.

The UN's Special Rapporteur on violence against women has noted that:[96]

> ... the due diligence responsibility comprises the obligation of states to: (a) prevent acts of violence against women; (b) investigate and punish all acts of violence against women; (c) protect women against acts of violence, and (d) provide remedy and reparation to victims of violence against women.

Although the above is well accepted by the Rapporteurs (past and present), there is still considerable debate about the specific scope and content of the due diligence standard in regards to violence against women.[97] Moreover, state assertion that "due diligence" is unclear leaves open the possibility of side-stepping their obligations.[98] As such, the current Rapporteur Rashida Manjoo has proposed a specific international legally binding instrument that clarifies state obligations regarding violence against women.[99] In the absence of such an instrument, there are two broad ways to interpret the due diligence standard.

If applying an expansive interpretation of "due diligence", there seems to be an inherent duty to prosecute. Indeed, jurisprudence of the Committee on the Elimination of Discrimination against Women indicates that where acts of violence against women are criminalised in domestic law, effective investigation and prosecution is required.[100] Moreover, investigations

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[96] *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences* GA A/66/215 (2011) at [50].

[97] *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences: Integration of the Human Rights of Women and the Gender Perspective: Violence against women: The Due Diligence Standard as a Tool for the Elimination of Violence against Women* ESC E/CN.4/2006/61 (2006) at [14]; *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences* GA A/HRC/29/27 (2015) at [63].

[98] Sennett, above n 95, at 547; see also *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences* (2015), above n 97, at [63].

[99] Manjoo has also proposed a specific monitoring body to oversee the implementation of state obligations in relation to violence against women see *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences* (2015), above n 97, at [63]; UN Office of the High Commissioner for Human Rights "UN Expert urges States to agree to Specific Legal Obligations to Fight Violence against Women and Girls" (media release, 22 June 2015).

[100] *Hakan Goekce, Handan Goekce and Guelue Goekce v Austria*, above n 84, at [12.1.2]; Committee on the Elimination of Discrimination against Women *R P B v The Philippines* CEDAW/C/57/D/34/2011 Communication No 34/2011 (2014) at [8.3]; See also *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Côte d'Ivoire,* above n 85, at [31(c)]-[31(d)]; Committee on the

must be prompt, impartial and conducted in good faith.[101] A failure to investigate and prosecute would therefore be a breach of the due diligence standard. Therefore, it would appear that the due diligence standard goes beyond what is expected under the Memorandum of Understanding between the UN and contributing state in terms of exercising criminal jurisdiction. In Chapter Three I argued that under the Model Memorandum of Understanding prosecution by the troop-contributing country was not required. However, prosecution and punishment following any conviction is necessary in order for states to meet the due diligence standard under international human rights law, particularly in relation to violence against women. Moreover, the context in which violence against women occurs has proved important for the application of the due diligence standard. Where a state continuously fails to seriously investigate and prosecute violence against women, this pattern of non-action has been evidence of failing to act with due diligence to protect, investigate and punish violence against women.[102] Thus, where a troop-contributing country has demonstrated a pattern of non-action (investigation/prosecution) against allegations of sexual exploitation and abuse this could be interpreted as condoning the behaviour (of violence against women).[103] A continuing failure to prosecute could therefore be a failure to act with due diligence and breach obligations under human rights law in regards to violence against women.

Elimination of Discrimination against Women *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Kuwait*, above n 100, at [31(b)]; Committee on the Elimination of Discrimination against Women *Concluding Observations of the Committee of Elimination of Discrimination against Women: Bangladesh* CEDAW/C/BGD/CO/7 (2011) at [20(b)]; As the relevant monitoring body for CEDAW, the Committee's interpretation of its provisions as a duty to prosecute could be construed as an "authoritative interpretation" see Scharf M "The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights" (1996) 59 *Law and Contemporary Problems* 41 at 48-50.

[101] See above n 99.

[102] *Case of Gonzales et al ("Cotton Field") v Mexico* (2009) Inter-American Court of Human Rights(Ser C) No 205 at 258; see discussion V Waiseman "Human Trafficking: State Obligations to Protect Victims' Rights, the Current Framework and a New Due Diligence Standard" (2010) *Hastings International and Comparative Law Review* 385 at 411-412.

[103] Waiseman, above n 102, at 419.

However, although the due diligence standard appears to step over the line of state sovereignty, some scholars argue that in practical terms (and state practice) it is unlikely to remove the state's ability to direct the investigation and punishment of offenders within their borders (including prosecutorial discretion). "Due diligence" is therefore read within the context of its limitations. Some scholars argue that there is only a narrow set of circumstances under international law where a duty to prosecute (or hand over the case to another state for the purposes of prosecution) is formally required.[104] Such circumstances include international humanitarian law under the Geneva Conventions. For example, a duty to prosecute is attached to "grave breaches" of the Geneva Conventions during armed conflict, such as wilful killing and torture (in connection to war crimes, crimes against humanity and genocide).[105] Outside of these contexts, the discretion of the state to prosecute is maintained. Moreover, obligations to prosecute may be limited by the state practice of providing amnesties, derogation or the existence of statutes of limitation.[106] Therefore, although the expansive interpretation of the due diligence, which would imply a duty on states to prosecute, would align with the jurisprudence of treaty bodies and human rights institutions, this may be limited by the reality of state practice.

Due diligence is also based on reasonableness ie states should take steps that are reasonable according to their legal framework and resources available to them in order to address violence against women.[107] The problem with the reasonableness standard is that states can invariably point to lack of resources as the reason for substandard attempts at implementation. Moreover,

[104] See generally Scharf, above n 100.
[105] At 43-48 and 52-59.
[106] M M Jackson "The Customary International Law Duty to Prosecute Crimes against Humanity: A New Framework" (2007) 16 *Tulane Journal of International and Comparative Law* 117 at 123 and 134; see also N Roht-Arriaza "Special Problems of a Duty to Prosecute: Derogation, Amnesties, States of Limitation, and Superior Orders" in N Roht-Arriaza (ed) *Impunity and Human Rights in International Law and Practice* (Oxford University Press, New York, 1995) 57.
[107] *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences* GA A/HRC/23/49 (2013) at [72]; Sennett, above n 95, at 543.

it is difficult to apply the same level of due diligence across all states, as it depends upon the individual state's resources and legal system.

The due diligence standard may also be used to argue that states should extend criminal jurisdiction over nationals abroad, particularly in the case of violence against women. Many treaties are silent as to whether states are required to assert extraterritorial jurisdiction. In the absence of such extraterritorial jurisdiction over the relevant sexual crimes TCCs will not be obligated to pursue their nationals operating abroad in domestic criminal law. Where jurisdiction is mentioned, treaties only require states to protect rights or react to violators "within the territory" of that state or simply "within that state's jurisdiction".[108] As a matter of principle states are permitted to assert jurisdiction over crimes that are committed by their nationals abroad and some treaties reflect this.[109] In the case of violence against women, the Special Rapporteur has noted that the due diligence standard obligates states to protect individuals within their jurisdiction.[110] Moreover, the Committee on the Elimination of Discrimination against Women has suggested that states will be responsible for all their human rights violations, even if they are committed against persons outside that state's territory.[111] Although not expressly required under any convention, it is arguable that for states to meet their obligations in relation to violence against women, in particular to comply with the due diligence standard, it is necessary to assert jurisdiction over their military contingents acting overseas. This conclusion is supported by the CEDAW Committee's comments in their

[108] ICCPR, art 2(1); CRC, art 2(1); CAT, art 10; Inter-American Convention on Human Rights, art 1(1).
[109] For example, CAT, art 5(b); Council of Europe Convention on Preventing and combating Violence against Women and Domestic Violence, art 44(b).
[110] *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences* (2013) above n 107, at [12].
[111] CEDAW *General Recommendation 28*, above n 7, at [12].

Observations on Côte d'Ivoire where TCCs were assumed to have jurisdiction over sexual exploitation and abuse committed by their military contingents.[112]

In sum, the exact scope and content of the due diligence standard has been questioned by states, debated among scholars and is in need of further development. Thus, while the due diligence standard can be given an expansive interpretation so as to include an obligation on TCCs prosecute peacekeepers, it may in fact be limited by state sovereignty and state practice. Any due diligence obligation related to violence against women may in reality be a similar obligation to that under the MOU – to submit the case to the appropriate national authorities.

(B) Criminalising Violence against Women

The due diligence standard clearly requires states to criminalise violence against women in their domestic law. The Special Rapporteur on violence against women and the Secretary General in his in-depth study on violence against women suggest that all forms of gendered violence should be criminalised.[113] However, as noted above, treaty bodies for the requisite instruments (ICCPR, ICESCR, CEDAW) focus instead on the criminalisation of only certain forms of violence, notably rape, and domestic violence. Arguably, this seems to reflect the fact that many states have not yet fully implemented the rights under the relevant treaties, and so treaty bodies focus on the most serious forms of violence rather than all forms of violence against women. The most serious forms would cover conduct described as "sexual abuse" but not "sexual exploitation".

[112] *Concluding Observations of the Committee of the Elimination of Discrimination against Women: Côte d'Ivoire*, above n 85.
[113] *Report of the Special Rapporteur on Violence against Women, its causes and consequences* (2011), above n 96, at [17]; Report of the Secretary General *In-Depth Study on all forms of Violence against Women* GA A/61/122/Add.1 (2006) at 86.

Therefore, whether states are required to criminalise all forms of violence against women, including all forms of sexual exploitation and abuse in criminal law, is unclear. It is at least arguable that the development of the "due diligence" standard in regard to violence against women seems to indicate that states are to work towards the criminalisation of all forms of violence against women. If a particular form of violence against women is criminalised then investigation, prosecution and punishment (following conviction) is expected. For troop-contributing countries that do have forms of sexual exploitation and abuse described as sexual crimes under their domestic criminal law and have asserted jurisdiction over their nationals abroad then the due diligence standard would require investigation and prosecution. Whether TCCs are required to criminalise all forms of sexual exploitation and abuse at the outset is not clear. At the most, the above discussion would lend itself to the argument that TCCs may be obligated to criminalise conduct falling under "sexual abuse". Again, Concluding Observations from the HRC and the CEDAW Committee indicate that many states are falling short of this requirement. This summary would therefore indicate that survival sex (sexual exploitation) is not required to be criminalised.

CONCLUSION

The aim of this chapter is to establish that there are human rights obligations on states to positively respond to sexual exploitation and abuse committed by their military contingent members. The table (below) summarises the information about the treaties (state obligations) discussed in this section. As shown in the table, a number of provisions in human rights treaties require states to criminalise or at least create a legal framework to address conduct which would be considered sexual exploitation and abuse.

Under the *International Covenant on Civil and Political Rights* and the *Convention against Torture*, acts of torture and other cruel, inhuman and degrading treatment have been interpreted

as including rape and other sexual violence against women. Although there are specific additional requirements, such as a prohibited purpose, there may be circumstances (however unlikely) where sexual abuse by peacekeepers would fulfil the definition of either torture or inhuman treatment. Moreover, in order to realise these obligations it would be necessary for states to assert criminal jurisdiction over their military members operating abroad. If such circumstances exist, a troop-contributing country's failure to investigate and prosecute would potentially give rise to state responsibility.

Under the *Convention on the Rights of the Child* there is an obligation on states to actively address violence against children (sexual exploitation and abuse). However, there appears to be no explicit obligation to criminalise. This may be because criminalising violence against children is simply assumed by the treaty, due to the egregious nature of the violation. States have discretion to address violations with administrative sanctions or penal sanctions. States are also required to investigate violations. Additionally, states have a wide discretion as to the age of maturity and there is therefore a possibility that persons under the age of 18 years will not be considered "children" in the domestic law of the TCC. Again, in order to fulfil the obligation to respect and ensure the rights under the CRC it may be necessary for states to assert extraterritorial jurisdiction over acts of violence against children. A contributing state's failure to investigate acts of sexual activity with children would give rise to state responsibility.

According to treaty bodies, "serious" forms of violence against women, such as rape, are currently required to be criminalised in domestic law. This perhaps suggests that current international understanding is that only conduct which is more likely to be considered "sexual abuse" is required to be criminalised. This leaves a gap concerning "sexual exploitation" (survival sex). The due diligence standard would suggest that if a particular form of violence against women is criminalised in domestic law then it must be investigated, the violator

prosecuted and if convicted punished. On an expansive interpretation the due diligence standard goes beyond what is expected in the Memorandum of Understanding between the UN and TCCs by requiring prosecution. In theory, where a TCC has criminalised a form of violence against women that fits within the concept of sexual exploitation and abuse by peacekeepers, then a failure to investigate and prosecute would give rise to state responsibility. However, this interpretation may be limited; in reality the national authorities must still retain prosecutorial discretion, whether to investigate or initiate prosecution. As a result, the due diligence standard may only require submission of the case to the appropriate national authorities on all cases of sexual abuse (required to be criminalised) and cases of sexual exploitation that happen to be criminalised under domestic law. Nevertheless, in order to fulfil the due diligence standard assertion of extraterritorial jurisdiction is required over those forms of violence against women that are criminalised under a troop-contributing country's domestic law.

This conclusion is quite unsatisfactory. Violence against women clearly encompasses "sexual exploitation". However, under the international human rights treaties, only the more serious forms of violence against women are required to be criminalised by states; thus leaving out survival-sex-type relationships. For victims of sexual exploitation (mostly young women) this gap in international human rights law may mean it is less likely the perpetrator will be punished, and justice will not be done. Considering the seriousness of sexual exploitation in the context of peacekeeping, and assuming its continued spotlight in international media reflects concern at this behaviour,[114] this gap is unacceptable.

[114] See for example, Amnesty International "CAR: UN Troops implicated in rape of girl and indiscriminate killings must be investigated" (news release, 11 August 2015); Esslemont T "EXCLUSIVE – UN Peacekeepers face new sex allegations in Central African Republic" *Trust* (11 November 2015) www.trust.org; Ghosh S "Are UN Peacekeepers Doing More Harm than Good?" *Aljazeera* (15 August 2015) http://www.aljazeera.com; K Willsher and S Laville "France Launches Criminal Inquiry into Alleged Sex Abuse by Peacekeepers" *The Guardian* (7 May 2015) http://www.theguardian.com/world.

The exclusion of survival-sex-type relationships (in the peacekeeping context) from the human rights discourse on violence against women should be addressed by one of the treaty bodies mentioned in this chapter; most relevant would be the Committee on the Elimination of Discrimination against Women. A CEDAW General Recommendation, for instance, might clarify state obligations in responding to survival sex (and sexual exploitation and abuse by peacekeepers more widely). There is room for more research here. As noted in Chapter Two, survival sex is one of the most common forms of sexual exploitation committed by peacekeepers. As these acts are not strictly required under current human rights law to be criminalised in domestic law, if a troop-contributing country has not done so and thus failed to take action against their contingent members then there will be no consequential state responsibility. State responsibility would therefore depend on the existence of domestic laws.

Treaty	**Conduct**	**Obligation to criminalise**	**Obligation to investigate and prosecute**	**Due diligence**	**Applicable to SEA by military contingents?**
ICCPR, arts 2, 7	Torture	Yes	Yes	Yes	Arguable in the prescribed circumstances
Arts 2, 7	Cruel, inhuman or degrading treatment	Yes	Yes	Yes	Arguable in the prescribed circumstances
Arts 2, 7	Violence against Women	Certain acts of violence against women	Yes	Yes	Yes
ICESCR, art 10	Violence against Children	Yes	Yes	Yes	Yes
CRC, arts 2(1), 32	Violence against Children	No (however, assumed "yes")	Yes	Yes	Yes
Arts 2(1), 32	Sexual exploitation and abuse of children	No (however, assumed "yes")	Yes	Yes	Yes
CEDAW, art 1	Violence against women	Certain acts of violence against women	Yes	Yes	Yes
CAT, arts 1, 2	Torture	Yes	Yes	Yes	Arguable in the prescribed circumstances
Art 16	Cruel, inhuman or degrading treatment	Yes	Yes	Yes	Arguable in the prescribed circumstances
CRC-OPSC, arts 2, 3	Child Prostitution	Yes (limited to the sale of children not the buying of sex)	Yes(limited to the sale of children not the buying of sex)	NA	No
Convention of *Belém do Pará* art 7	Violence against Women	Certain acts of violence against women	Yes	Yes	Yes
ACHPR-OP, art 4(b)	Violence against Women	Certain acts of violence against women	Yes	Yes	Yes

Table: Treaty Obligations

CHAPTER FIVE: STATE RESPONSIBILITY & POLITICAL MEASURES

INTRODUCTION

From the previous chapters it has been concluded that troop-contributing countries have certain positive obligations in relation to sexual exploitation and abuse by peacekeepers that arise out of several sources of international law. Firstly, the Model Memorandum of Understanding (between the UN and the troop-contributing country) requires contributing countries to exercise criminal jurisdiction over serious misconduct which is considered criminal under domestic law. "Exercise of criminal jurisdiction" under the MOU merely obligates the contributing state to submit cases to the appropriate national authorities. As this thesis argues that the MOU is a treaty, a failure to exercise jurisdiction will be a breach of an international obligation. Not only should there be consequences under treaty law (as discussed in Chapter Three) but there may also be wider consequences of state responsibility which may support the UN issuing coercive or non-coercive measures against non-compliant states. Here, the UN may take leadership in responding to sexual exploitation and abuse. It should be noted at the outset that sanctioning non-compliant states does not in and of itself guarantee that justice will be done; it does, however, draw attention to a general failure of states to respond to violence against (predominately) women. For the UN to sanction states in this way signifies the seriousness of sexual exploitation and abuse and perhaps make victims more visible to the international community (and perhaps encourage accountability).

Secondly, there are other obligations that arise under human rights law. Where a TCC is party to the relevant international treaty, there are positive duties on states in relation to

sexual conduct that falls within the definition of torture or cruel, inhuman or degrading treatment; sexual exploitation of children; and violence against women. Those obligations linked to the exercise of criminal jurisdiction involve the criminalisation of torture (or cruel, inhuman or degrading treatment), sexual exploitation of children, and some "serious" forms of violence against women. States are additionally obligated to investigate, and if possible prosecute, and if convicted, punish violators. Potentially, if TCCs fail to take any one of these steps they will be in breach of their international obligation to take positive action.

This chapter explores circumstances under which sanctions can be implemented, by the UN using the principles of state responsibility to support such sanctions.[1] The relevant instrument to work with for this purpose is the International Law Commission's *Articles on the Responsibility of States for Internationally Wrongful Acts* (ARSIWA).[2] It is important to note that the legal status of the ARSIWA is not yet fixed; while they have been noted by the UN General Assembly, the Articles are not an independent source of law.[3] However, when drafted the Commission sought to cover all forms of state responsibility that reflect, or are influential upon, state practice.[4] Moreover, international judicial institutions have periodically referred to the Articles when considering state responsibility.[5] Therefore, they

[1] See for example, Z Deen-Racsmary "The Amended UN Model Memorandum of Understanding: A New Incentive for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents?" (2011) 16 *Journal of Conflict and Security Law* 32; E F Defeis "UN Peacekeepers and Sexual Abuse and Exploitation: An end to Impunity" (2008) 7 *Washington University Global Studies Law Review* 186; A Harrington "Victims of Peace: Current Abuse Allegations against UN Peacekeepers and the role of the Law in Preventing them in the Future" (2005) 12 *ILSA Journal of International & Comparative Law* 125; V Kent "Peacekeepers as Perpetrators of Abuse" 14 *African Security Review* 85; R Murphy *UN Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues in Practice* (Cambridge University Press, Cambridge, 2007); M Odello "Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers" (2010) 15 *Journal of Conflict & Security Law* 347.

[2] *Responsibility of States for Internationally Wrongful Acts* GA Res A/Res/56/83 (2001)*:* [ARSIWA].

[3] J Crawford and S Olleson "The Character and Forms of International Responsibility" in M Evans (ed) (4th ed, Oxford University Press, Oxford, 2014) 443 at 444.

[4] At 447-448.

[5] See Report of the Secretary-General *Responsibility of States for Internationally Wrongful acts: Compilation of decisions of international courts, tribunals and other bodies* GA A/62/62 (2007); Report of the Secretary-General *Responsibility of States for Internationally Wrongful acts: Compilation of decisions of international courts, tribunals and other bodies* GA A/65/76 (2010); Report of the Secretary-General *Responsibility of States for Internationally Wrongful acts: Compilation of decisions of international courts, tribunals and other bodies* GA A/68/72 (2013).

can be said to represent the current consensus on state responsibility, and so form the framework, thus they will be relied upon for the purposes of this section. Additionally, the *Articles on the Responsibility of International Organizations* (ARIO) will be considered.[6] The ARIO was modelled on the ARSIWA and largely mirrors its provisions.[7] It has similarly been noted by the General Assembly.[8] However, states have pointed out that in certain areas the ARIO represents law which is currently unclear; this is particularly true of article 17 (involving the responsibility of member states for the internationally wrongful acts of IOs).[9] The law on the responsibility of IOs is still developing, with the Articles being a guide as to its direction.[10]

For state responsibility to arise there must first be an internationally wrongful act; thus, conduct or an omission of the state that is considered a breach of an international obligation owed by that state.[11] The sources of obligations identified above to exercise criminal jurisdiction over sexual exploitation and abuse represent primary rules of international law. A breach of an obligation of such primary rules will be an "internationally wrongful act" for the purposes of the ARSIWA.[12] Additionally, the internationally wrongful act must be attributable to the state.[13] As the failure to exercise criminal jurisdiction is firmly attached to the state itself, it can be asserted that the breach is attributable to the state.

This chapter will explore the consequences of state responsibility, however, it will not strictly apply the principles of state responsibility or the responsibility of international

[6] *Articles on the Responsibility of International Organizations* GA Res A/66/10 (2011): [ARIO].
[7] D Akande "International Organizations" in M D Evans (ed) *International Law* (4th ed, Oxford University Press, Oxford, 2014) 248, at 265.
[8] *General Assembly Resolution Responsibility of International Organizations* GA Res A/Res/69/126 (2014).
[9] See for example, General Assembly *Summary Record of the 18th Meeting* A/C.6/69/SR.18 (2015) at [47]-[80]
[10] *Summary Record of the 18th Meeting,* above n 9, at [69].
[11] ARSIWA, art 2.
[12] ARSIWA, art 2(b).
[13] ARSIWA, art 2(a).

organisations. To apply ARIO/ARSIWA strictly requires determining whether the UN is an "injured" or "non-injured" party.[14] Such a discussion is not useful or particularly relevant here, because the failure of states to discharge their obligations to respond to sexual exploitation and abuse causes harm to individuals, who do not see justice being done. Instead, the UN may point to the principles of state responsibility and the responsibility of IOs to support the use of coercive or non-coercive measures; ARIO/ARSIWA are useful tools to guide the use of such sanctions against non-compliant states. I will also assess the sanctions in light of the three underlying principles I identified in Part One; justice being seen to be done, host state ownership and UN leadership. Additionally, the issue of which organ of the UN is best suited to authorise such sanctions will be discussed.

The chapter will conclude that while withdrawing troops and blacklisting states may be considered too "punitive" to be lawful countermeasures under the principles of state responsibility or the responsibility of IOs, they may still be employed as part of a political strategy against the TCC. Moreover, naming and shaming states appears to be the direction the UN is currently taking. Withdrawing troops or blacklisting states achieves the immediate removal of perpetrators from the host state community, but does not guarantee that the offender will ever be brought to justice. Additionally, it is not perceived that the host state has any ownership in such decisions. Nevertheless, the removal of troops, blacklisting of states and naming and shaming TCCs which fail to exercise criminal jurisdiction is a show of strong UN leadership in responding to sexual exploitation and abuse.

(1) Consequences – Sanctions against the State

Sanctions that have been suggested by academics are primarily of a coercive nature. Of the most coercive are economic sanctions, which I will deal with below. The more popular

[14] ARSIWA, arts 49(1); ARIO, arts 51(1).

options are withdrawing contingents and prohibiting states from contributing to peacekeeping.[15] Such measures could be considered coercive as they interfere with the voluntary right under the UN Charter of member states to contribute.[16] Moreover, an immediate removal of troops from peacekeeping operations could have a detrimental impact on the mission itself with fewer personnel on the ground for a period while the UN sources troops from other states. Additionally, they appear to be punitive in nature – as a response to failing to exercise criminal jurisdiction. This can be compared to non-coercive measures that seek to put states on notice such as naming and shaming non-compliant states.

Withdrawal and blacklisting measures have been suggested by academics and there has been growing official support for these options, particularly from the UN Secretariat. The Group of Legal Experts recognised that the UN maintains the "ultimate sanction"[17] of refusing to accept or seek troops from particular member states (without going into detail about which organ of the UN is officially capable to "refuse" such troops). Although this does not translate directly into "blacklisting states", it does indicate that there is some official support for this. The Secretary-General has made recent statements supporting the forced removal of contingents that exhibit a "pattern of non-compliance".[18] However, scholars have cast doubt on whether such a course of action is wise given the difficulties in persuading enough countries to contribute troops to peacekeeping operations.[19] Nevertheless, the Security

[15] See for example Deen-Racsmany, above n 1, at 342; Defeis, above n 1, at 209; Harrington, above n 1, at 148.
[16] Charter of the United Nations, art 2(2).
[17] *Report of the Group of Legal Experts on Making the Standards contained in the Secretary-General's Bulletin binding on Contingent Members and Standardising the Norms of Conduct so that they are applicable to all Categories of Peacekeeping Personnel* GA A/61/645 (2006) [Second Group of Legal Experts Report] at [10].
[18] Report of the Secretary-General *The Future of United Nations Peace Operations: Implementation of the Recommendations of the High-Level Independent Panel on Peace Operations* GA A/70/357-S/2015/682 (2015) at [120].
[19] See for example Deen-Racsmany, above n 1, at 342; Defeis, above n 1, at 209; Harrington, above n 1, at 148.

Council issued Resolution 2272 in March 2016 which endorsed and authorised the removal of entire contingents is there was a pattern of sexual exploitation and abuse.[20]

A non-coercive measure that has been suggested is to publically name states that fail to hold offenders to account or report back to the UN on outcomes of exercise of jurisdiction.[21] This suggestion has support at the official UN level. Naming and shaming contributing countries was supported by the Zeid Report where it was noted that such action should be undertaken by the Secretary-General in his annual reports where states fail to report outcomes of cases to the UN.[22] Prince Zeid was reluctant to attach such a response to other failures that may be made by TCCs, such as the failure to prosecute or even submit the case to the appropriate national authorities.[23] Additionally, since his 2013 annual report on sexual exploitation and abuse the Secretary-General has suggested he will include country-specific data on non-compliant troop-contributing countries.[24]

Under the principles of state responsibility, there are multiple steps that are required from the state in breach and the state or IO invoking that responsibility. Using these principles as a guide to how the UN may respond to non-complaint states, the first option that will be briefly discussed will be economic sanctions. The second will be cessation, reparation and promises of non-repetition. The third option is that of countermeasures; this is where the majority of coercive measures suggested by academics would lie.

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[20] *Security Council Resolution 2272* SC Res S/Res/2272 (2016).
[21] For example Kent, above n 1, at 90; C Leck "International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct" (2009) *Melbourne Journal of International Law* 346 at 356.
[22] General Assembly *United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel* GA Res A/RES/62/214 (2008) [Zeid Report] at [82].
[23] At [80].
[24] Report of the Secretary-General *Special Measures for Protection from Sexual Exploitation and Abuse* GA A/67/766 (2013) at [25]; Report of the Secretary-General *Special Measures for Protection from Sexual Exploitation and Abuse GA* A/68/756 (2014) at [33].

(A) Economic Sanctions

Some authors[25] have suggested the more serious measure of trade or other economic sanctions. Scholars such as Alexander Harrington argue that the threat of sanctions would be difficult for TCCs to ignore and help compel states to prosecute those responsible for sexual exploitation and abuse to the full extent of their domestic criminal law.[26] The General Assembly may recommend economic sanctions, and it is also within the power of the Security Council to impose them.[27] It is certainly not within the powers of the Secretary-General.[28] Furthermore, such measures are typically only implemented as a response to a breach or threat to international peace and security.[29] While the interpretation of whether an act (or omission) is a breach or threat to international peace and security has been broadly defined, it is unlikely that sexual exploitation or abuse by peacekeepers would qualify. Additionally, economic sanctions may have detrimental consequences for the TCCs, many of which are developing states. Moreover, there is no previous practice to suggest that the Security Council would impose sanctions for non-compliance by states. Therefore, I argue that imposing economic sanctions on troop-contributing countries for failing to exercise their criminal jurisdiction in relation for sexual exploitation and abuse is an unlikely option.

(B) Cessation, Reparation, Assurances and Guarantees of Non-Repetition

According to the principles of state responsibility and the responsibility of IOs, one response to a state's wrongful act would be for the UN to demand cessation and non-repetition.[30]

[25] For example see Defeis, above n 1 and Harrington, above n 1.
[26] Harrington, above n 1, at 147-148.
[27] See Charter of the United Nations, Chapter VII.
[28] Or the Under Secretary-General which officially heads UN Peacekeeping Operations see Charter of the United Nations, arts 97-101.
[29] Charter of the United Nations, Chapter VII.
[30] ARSIWA, art 28-31; ARIO, arts 29-31.

Cessation implies that a state is doing something in breach of its international obligations rather than omitting to fulfil its obligations. Therefore, requiring the TCC to stop failing to exercise criminal jurisdiction will not suffice. On the other hand, states are also under an obligation to provide assurances and guarantees of non-repetition. Here it is arguable that states would need to assure that they will in future exercise criminal jurisdiction.

Additionally, the troop-contributing country would be under an obligation to make reparations. Reparations cannot be used to punish the state for the wrongful act; rather it is for mitigating or mending the damage done by the wrongful act (whether physical or moral damage).[31] There are three forms of reparations;[32] firstly, restitution requires states to "re-establish the situation which existed before the wrongful act"; secondly, compensation for the damage caused by the wrongful act which is not covered by restitution; thirdly, satisfaction.

The most relevant form of reparation for an omission such as the failure to exercise criminal jurisdiction over peacekeepers who had committed sexual exploitation or abuse would be that of satisfaction. Restoring the situation before the wrongful act (restitution) would not address the issue of failure to exercise criminal jurisdiction. Moreover, compensation is for damage caused that is financially assessable. As the damage caused to the host state, or even the UN, is one of purely moral or political reputation, it is not necessarily financially assessable. Satisfaction is about acknowledging the breach and expressing regret, and this may be achieved through an apology.[33] Therefore, satisfaction would be the best option of reparation; the TCC would be required to acknowledge the breach and issue a formal apology.[34] In light of the three principles that underlie this thesis, acknowledgement of the

[31] J Klabbers *International Law* (Cambridge University Press, Cambridge, 2013) at 131.
[32] See ARSIWA, art 34-37; ARIO, arts 34-37.
[33] ARSIWA, art 37(2).
[34] Reparations to individual victims and their communities will be discussed in Chapter Nine.

breach and a formal apology may not result in "justice being seen to be done". However, these acts may have some element of engagement with the host state, as it would arguably receive an apology for failing to exercise criminal jurisdiction over sexual exploitation and abuse committed against a national. By directing this outcome, the United Nations would be illustrating strong leadership in responding to sexual exploitation and abuse.

The above options fall short of the more ambitious measures contemplated by academics and found in official UN reports. However, it is still possible that sanctions may be used "to enforce cessation of the breach and reparation of the beneficiaries of the obligation".[35] Naming and shaming the TCC may be an example here.

(C) COUNTERMEASURES

Under the principles of state responsibility and the responsibility of IOs, countermeasures are restricted to "lawful measures".[36] They must be used in order to induce the state to provide reparation for injury caused by the internally wrongful act (cessation, reparation, or non-repetition).[37] Furthermore, countermeasures must be proportionate to the gravity of the internationally wrongful act.[38] According to ARSIWA/ARIO there are certain steps that must be taken before countermeasures may be taken; for example, the state or IO must:[39]

> (a) call on the responsible state, in accordance with article 43, to fulfil its obligations under part two;
>
> (b) notify the responsible state of any decision to take countermeasures and offer to negotiate with that state.

[35] ARIO, art 57.
[36] ARSIWA, art 54; ARIO, art 57.
[37] ARSIWA, art 49.
[38] ARSIWA, art 51.
[39] ARSIWA, art 53(1)(a) and(b).

Countermeasures will not be available if the dispute is pending before a "tribunal which has the authority to make decisions binding on the parties".[40] This would apply if the dispute resolution mechanism under the Memorandum of Understanding was initiated or pending.[41] If countermeasures are taken without fulfilling the above requirements then they themselves will be an internationally wrongful act.[42]

The tougher measures suggested by academics must be used to induce compliance rather than punish the state for non-compliance. The coercive nature of blacklisting states and removing contingents could be argued to be punitive. Countermeasures must also be proportionate, which might also be problematic in terms of some of the measures suggested. For example, a withdrawal of an entire contingent in response to the TCC's failure to exercise criminal jurisdiction over one of its members may be seen as not proportionate. This could arguably be the same for blacklisting TCCs. However, evidence of continued lack of prosecution of a number of members of a contingent may then change the nature of the breach enough to make the countermeasure "proportionate".

Nevertheless, the appropriate measures to be taken by the UN may depend on the particular circumstances surrounding the TCC's failure to exercise criminal jurisdiction over sexual exploitation and abuse by its contingent members. For example, the withdrawal of an entire contingent as a countermeasure to a single occasion where the TCC does not refer the case to the appropriate national authority may not be "proportionate". In such instances, perhaps "naming and shaming" would be a more proportionate measure. Perhaps, the withdrawal of troops and blacklisting options are more appropriate for the continuous failure to exercise

[40] ARSIWA, art 53(3)(b).
[41] *Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual)* GA A/c.5/66/8 (2011) ch. 9 Memorandum of Understanding [2007 MOU] art 13.
[42] N White and A Abass "Countermeasures and Sanctions" in M Evans (ed) *International Law* (4th ed, Oxford University Press, Oxford, 2010) 531 at 534.

criminal jurisdiction. Determination of such a "magic number" may in itself be problematic, as to a single victim of sexual exploitation who has yet to see justice been done waiting until there is a pattern of TCC failure to hold offenders to account before coercive UN action in terms of countermeasures would seem superfluous. Although withdrawing troops or blacklisting states achieves the removal of perpetrators from the host state community, there is no guarantee that the individual offender will be brought to justice. Additionally, host states are unlikely to have any ownership in such decisions. Again, the only principle that is fulfilled here is UN leadership. In regards to naming and shaming states, this would again only fulfil the third principle of UN leadership, however if the naming and shaming led to future improvement in investigation and prosecution of offenders by TCCs, then eventually justice will be seen to be done. However, for individual victims, again, such a "waiting game" may seem superfluous and perhaps be psychologically and emotionally harmful.

(D) Political Strategies

As withdrawing contingents and blacklisting states are arguably too punitive for countermeasures, they may instead be employed as part of political strategies. This exposes the weakness of the law on state responsibility and the responsibility of international organisations. Although state obligations are arguably breached, the potential measures that are most embraced by academics and UN officials (withdrawal and blacklisting states)[43] would not fall within the legal boundaries. Moreover, if framed as "political strategies" these measures could be undertaken without strict evidence that an obligation has been breached. As the law on state responsibility and the responsibility of IOs is still evolving (particularly regarding evoking responsibility and countermeasures), it is unclear whether the imposition of such measures would be legally sanctioned or within the power of the UN and its organs

[43] See for example Deen-Racsmany, above n 1, at 342; Defeis, above n 1, at 209; Harrington, above n 1, at 148.

to implement without state responsibility ever coming into question. Due to this legal ambiguity, in practice state responsibility may not be needed at all as long as it is generally accepted (perhaps even only politically) that it is within the power of the UN to implement such measures.

(E) "WHO" WILL ENFORCE SUCH MEASURES AGAINST CONTRIBUTING COUNTRIES?

The issue as to "who" in the United Nations would implement measures against troop-contributing countries highlights the difference between what is legally possible and the political reality. Although it is arguable that it is within the powers of the Secretary-General to order the withdrawal of contingents from peacekeeping missions, depending on the circumstances it would perhaps be more appropriate for the Security Council to do so. However, in terms of "naming and shaming" it appears from the 2013 report that the Secretary-General believes it is within their general powers to do so.[44] Moreover, recent statements made by the Secretary-General reveal that he believes it is also within his powers to withdraw entire contingents.[45] As noted in Chapter Three, the Secretary-General did remove an entire contingent in 2005, not for sexual exploitation, but for serious financial misconduct.[46] It is unclear whether the UN requested the troop-contributing country in that instance to withdraw troops or whether withdrawal was ordered. It should be noted that the sources are contradictory on this issue.[47]

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[44] *Special Measures for the Protection from Sexual Exploitation and Abuse* (2013), above n 24, at [25].
[45] *The Future of Peace Operations*, above n 17 at [120].
[46] In 2005 the Secretary-General had a contingent from Ukraine removed from UNIFIL for serious financial misconduct see Murphy, above n 1, at 303; *Report of the Secretary-General on the activities of the Office of Internal Oversight Services* GA A/60/364 (2005) at [25]-[26]; "Scandal hits Ukrainian UN Troops" *BBC News* (3 September 2005) http://news.bbc.co.uk; see also Secretary-General Kofi Annan *Letter dated 13 April 2006 from the Secretary-General addressed to the President of the Security Council* S/2006/245 (2006).
[47] The Secretary-General's letter was silent on whether withdrawal was ordered or requested, see *Letter dated 13 April 2006* above n 46; Murphy simply states that the UN "announced" the replacement of troops, see

In terms of the Memorandum of Understanding, it is signed by the Under Secretary-General in the Department of Field Support for Peacekeeping Operations.[48] This seems to suggest that the signing of individual agreements between TCCs and the UN for particular missions is delegated to the Under Secretary-General as part of an administrative procedure. As such, it would be within the powers of the Under Secretary-General, or the Secretary-General proper, to terminate the MOU or otherwise order the withdrawal of the relevant contingent. However, if withdrawal of contingents would mean the removal of a greater part of the entire peacekeeping force in the mission itself it would be difficult to argue that the Secretary-General could independently order the withdrawal without Security Council approval. The removal of a great number of peacekeeping personnel may have a detrimental impact on the mission itself signifying a political crisis as well as an administrative one. It would be difficult to imagine the Security Council not intervening in such decisions. Therefore, the Security Council would possibly be the organ of the UN to implement the more coercive measures against non-compliant troop-contributing countries or at least be formally consulted on such matters.

Security Council Resolution 2272, which authorises the Secretary-General to remove entire contingents where there is a pattern of sexual exploitation and abuse, does not attach these measures to a failure to discharge any specific obligation under international law. Instead, the Resolution links these measures to "the primary responsibility of troop-contributing countries to investigate allegations of sexual exploitation and abuse by their personnel and of troop- and police-contributing countries to hold accountable, including through prosecution, where appropriate, their personnel for acts of sexual exploitation and

Murphy, above n 1, at 303; the media item however says that the UN "told" the Ukrainian government to withdraw their troops, see "Scandal hits Ukrainian UN Troops" above n 46.

[48] See 2007 MOU, last page.

abuse…"[49] Firstly, the Resolution supports the argument that the Security Council is the organ of the UN which should endorse and authorise coercive measures against non-compliant states. Secondly, the provisions themselves are broad enough to interpret a single omission to respond to sexual exploitation and abuse as enough to authorise the Secretary-General to remove entire contingents. If this interpretation is correct, then the effect of this Resolution is to recognise the gravity of harm caused to a single victim and this is significant for the overall recognition of the seriousness of violence against women on the international stage. It remains to be seen whether the Resolution will be utilised in such a way.

CONCLUSION

The sanctions suggested by academics include economic sanctions, withdrawal of troops, blacklisting TCCs, and naming and shaming non-compliant states. Economic sanctions are unlikely to be implemented. While withdrawing troops and blacklisting states may be considered too "punitive" to be lawful countermeasures, they may still be used as part of a political strategy against troop-contributing countries. The Secretary-General appears to be favouring naming and shaming non-complying TCCs. The Security Council has favoured coercive measures. In light of the three underlying principles of this thesis, this conclusion is unsatisfactory. Although withdrawing troops and blacklisting states achieves the immediate removal of perpetrators from the host state community, there is no assurance that the offender will be brought to justice. Additionally, it is unlikely that the host state would have any ownership in such decisions. Nevertheless, the removal of troops, blacklisting of states and naming and shaming TCCs which fail to exercise criminal jurisdiction is a show of strong UN leadership in responding to sexual exploitation and abuse.

[49] *Security Council Resolution 2272* SC Res S/Res/2272 (2016).

CONCLUSION TO PART TWO

Troop-contributing countries have exclusive criminal jurisdiction over crimes committed by members of their military contingents. Under the Model Memorandum of Understanding between the United Nations and TCCs these states make assurances that they will "exercise criminal jurisdiction". In the event that contributing countries do not fulfil these assurances in relation to acts of sexual exploitation and abuse some academics have suggested that the UN should sanction those TCCs.[50] Suggested sanctions include coercive measures, such as economic sanctions, removing contingents and blacklisting non-compliant states, and non-coercive measures such as "naming and shaming". Part Two has explored whether there are obligations on TCCs to criminalise, investigate, prosecute and punish sexual exploitation and abuse. The following summarises the primary conclusions that can be drawn from this Part.

(A) FAILURE TO SUBMIT THE CASE TO THE APPROPRIATE NATIONAL AUTHORITIES UNDER THE MEMORANDUM OF UNDERSTANDING

As this thesis has taken the position that the Memorandum of Understanding is a treaty and that its provisions are binding on troop-contributing states, states are therefore obligated under the MOU to "exercise criminal jurisdiction" over crimes committed by members of their national contingents. However, the "exercise of criminal jurisdiction" requires the troop-contributing country to merely submit the case to the appropriate national authorities. If the appropriate national authorities fail to investigate or prosecute then this will not be a breach of the MOU.

[50] See Deen-Racsmary above n 1; Defeis above n 1; Harrington above n 1; Kent above n 1; Murphy, above n 1; Odello, above n 1.

A failure to at least submit a case to the appropriate national authorities will however be a "material breach" of the MOU. There are certain consequences for such a breach under treaty law. For instance, the TCC and the UN would have to engage with a dispute resolution process. If a resolution is not found then the UN may be entitled to terminate the treaty. Both processes rely on the will of TCCs to actively engage with the dispute resolution process. In regards to the underlying principles of this thesis, a termination of the treaty would result in the removal of contingents and although such a move would signify UN leadership, it does not follow that justice will be seen to be done, and the host state is not involved.

(B) Failure to criminalise, investigate, prosecute and punish torture, or cruel, inhuman and degrading treatment, sexual activity with children and "serious" forms of violence against women

The "due diligence" standard under international human rights law goes further than what is required under the Memorandum of Understanding, at least conceptually. Potentially, troop-contributing countries are obligated under certain treaties (for example ICCPR, ICESCR, CRC, and CEDAW) to not only hand the case over to the appropriate authorities but to investigate, prosecute and punish violators. This is the case for certain forms of sexual abuse and exploitation; including torture, or cruel, inhuman and degrading treatment, sexual activity with children, rape, and sexual violence. Moreover, states are required to have these particular acts criminalised. If a state fails to exercise criminal jurisdiction at any one of these stages – criminalisation, investigation, prosecution, punishment – then the troop-contributing country would be in breach. However, the due diligence standard is still unclear in its meaning and scope, and possibility limited by state sovereignty and state practice (such as prosecutorial discretion). Hence, the obligation on states may be limited to submitting the case to relevant national authorities and if investigated, then this would be regarded as acting in good faith. A breach of this obligation would be considered an internationally wrongful

act and thus the principles of state responsibility will apply. As a result, the UN may be entitled to use countermeasures. There will also be consequences for states under the relevant human rights treaty.

(C) Identifiable gap: the Investigation and Prosecution of Survival Sex

Under the international human rights treaties, there are certain forms of violence against women that do not require criminal sanction, at least not in domestic criminal law. Rape, sexual violence and similarly "serious" forms of sexual abuse do require criminalisation under various human rights treaties. However, the most relevant forms of violence against women in the peacekeeping context, notably "survival sex", are seemingly not considered "serious" enough to warrant the same treatment. In sum, there are no obligations under human rights law on troop-contributing countries to criminalise, investigate or prosecute these "lesser" forms of sexual exploitation. Therefore, sanctions for failing to exercise criminal jurisdiction over this kind of conduct would have to rely on a breach of the Memorandum of Understanding alone. Unfortunately, if no investigation or prosecution eventuates after that step has been taken then there will be no "internationally wrongful act" upon which sanctions could be based.

(D) Coercive Sanctions against the Troop-Contributing Country are Unlikely

Economic sanctions are unlikely to be implemented because sexual exploitation committed by peacekeepers is unlikely to be considered a threat to international peace and security, and sanctions themselves would have detrimental consequences for TCCs, many of which are developing states. Removing contingents and preventing states from contributing are fairly coercive steps that interfere with the voluntary rights of member states to contribute to peacekeeping operations. Therefore, according to the law of state responsibility and the

responsibility of international organisations, governing the use of countermeasures, such coercive measures may not be considered "proportional" to a single occasion of a failure to investigate or prosecute. Moreover, they may also be regarded as punitive in nature.

(E) Political Strategies to Employ – Only serve a Partial Response

Although states are obligated under various areas of international law to exercise criminal jurisdiction, the coercive measures suggested by academics and UN officials (withdrawing troops and blacklisting states) fall outside legally endorsed activities (within countermeasures). Such measures may instead be framed as "political strategies" and may be the most likely direction that the UN takes in response to continued failures by troop-contributing states to exercise criminal jurisdiction. Nevertheless, the Security Council has endorsed and authorised the use of coercive measures in Resolution 2272.

The UN could also "name and shame" non-compliant states. Such a list of non-compliant states could be included in the Secretary-General's annual report on sexual exploitation and abuse in peacekeeping. Indeed, this is what the Secretary-General himself has proposed.

However, these political strategies only serve as a partial response to the problem. The top-down approach of measures against troop-contributing states does not reflect the three conceptual principles outlined at the beginning of this thesis; they do not achieve justice being seen to be done and do not involve host state ownership. Victims are not mentioned in the Model MOUS, highlighting the silence of those perspectives, and there is an identifiable gap in state obligations regarding survival sex.

Therefore, other avenues of responding to sexual exploitation by military contingent members need to be explored. Part Three continues this exploration by examining other

avenues for prosecuting offenders, namely host state jurisdiction and the International Criminal Court.

PART THREE: ALTERNATIVE WAYS TO PROSECUTE: DESIRABLE YET UNSATISFACTORY OPTIONS

INTRODUCTION TO PART THREE

The overall purpose of this thesis to explore different ways the United Nations can improve accountability in response to military contingent members who commit sexual exploitation and abuse. Part Three explores the second broad category of suggestions to improve accountability; alternative ways to investigate and prosecute offenders.

Part Three looks at two desirable options for improving accountability - host state jurisdiction and the International Criminal Court (ICC). However, for different reasons these options are also unsatisfactory. Chapter Six considers host state jurisdiction, a venue for accountability which reflects the key principles I identified in Part One (justice being seen to be done, host state ownership, and UN leadership). Nevertheless, there are certain limitations that will be discussed which make host state jurisdiction unsatisfactory.

Chapter Seven will examine the International Criminal Court. Despite some pragmatic advantages, I also conclude that the ICC is unsatisfactory. The jurisdiction of the Court is hindered by its scope (limited to international crimes), the complementarity principle and the Prosecutor's discretion. Moreover, prosecution by the ICC does not fulfil any of the three principles underlying this thesis.

CHAPTER SIX: HOST STATE JURISDICTION

INTRODUCTION

As exclusive criminal jurisdiction of the troop-contributing country (TCC) has arguably led to an accountability gap, alternative ways to hold military contingent members who commit sexual exploitation and abuse to account should be explored. One such alternative is host state jurisdiction. In this chapter I will first briefly summarise how jurisdiction is approached under the current system. Secondly, I will explore the different ways in which host state jurisdiction may be achieved, for example, the Group of Legal Experts' proposed convention-based system. This chapter will summarise the reasons why some commentators have proposed host state jurisdiction as an alternative accountability mechanism, and also explore the possible disadvantages of such jurisdiction.

In light of the three principles identified in Part One of this thesis, host state jurisdiction clearly fulfils two of these. If trials are held within the victim's community, justice is seen to be done, and the host state has some ownership over that process. If host state jurisdiction is achieved through processes that foster cooperation between host states, troop-contributing countries and the UN, then the UN will have some leadership in responding to sexual exploitation and abuse as well. If the goal is to improve accountability mechanisms, being guided by these three principles, then host state jurisdiction is desirable. However, I will conclude that although host state jurisdiction and cooperation between the UN, host states and troop-contributing states may be achieved through agreements or a treaty guaranteeing some form of host state jurisdiction, it may be more beneficial to explore alternative structural measures, such as judicial tribunals.

(1) JURISDICTION – STATUS QUO

Under the Model Sates-of-Forces Agreement (SOFA), the troop-contributing country has exclusive criminal jurisdiction over their national military personnel.[1] Therefore, although members of national contingents are expected to respect local laws and customs, the host state waives its territorial jurisdiction under the SOFA.[2] In regard to other categories of personnel, such as UN officials and experts on mission, functional immunity is granted under various international instruments.[3] Such immunities are limited to acts committed during official duties; criminal offences (including acts of sexual exploitation and abuse) committed outside official capacity would potentially be subject to host state jurisdiction.[4] However, if the host state judicial system is unstable (for example, due to ongoing conflict, physical destruction or corruption) it may not be appropriate for the host state to exercise such jurisdiction and therefore it will likely still be waived under the SOFA.[5]

(2) HOST STATE JURISDICTION

In light of the mass reports of sexual exploitation and abuse allegations during the early 2000s, the UN commissioned a Group of Legal Experts to explore options for increased accountability of its staff and experts on mission (as well as other personnel).[6] The Group argued that host state jurisdiction should be prioritised when responding to crimes committed by peacekeeping

[1] The agreement between the UN and the host state *Model Status of Forces Agreement between the United Nations and Host Countries* GA A/45/594 (1990) [Model SOFA] at art 47(b).
[2] Model SOFA, above n 1, at art 6. A more detailed discussion of the Model SOFA and exclusive criminal jurisdiction is included in Chapter Three of this thesis.
[3] Charter of the United Nations, art 105; *Convention on the Privileges and Immunities of the United Nations 1 UNTS 15 (Opened for signature13 February 1946, entered into force 17 September 1946)* art VI (22)(b).
[4] *Report of the Group of Legal Experts on Ensuring the Accountability of United Nations Staff and Experts on Mission with Respect to Criminal Acts Committed in Peacekeeping Operations* GA A/60/980 (2006) [Group of Legal Experts Report] at [21].
[5] At [22].
[6] Group of Legal Experts Report, above n 4; See also Secretary-General *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations* GA A/59/710 (2005).

personnel within host state territory.[7] To prioritise host state jurisdiction was to acknowledge the principle of territorial jurisdiction,[8] to follow through with the obligation on peacekeeping personnel to respect local laws and customs and to make sure victims would see justice being done.[9]

Host state jurisdiction realises two of the principles underlying this thesis. With trials being held within the victim's community, justice is seen to be done, and the host state may have ownership over that process. If host state jurisdiction can be achieved through intervention of the UN, by implementing a system of cooperation between the host state, TCC and the UN, then the organisation will have proven leadership in responding to sexual exploitation and abuse. If the goal is to improve accountability mechanisms, using these three principles as a guide, then host state jurisdiction is desirable. However, as will be seen below, host state jurisdiction may not always be possible.

The Group of Legal Experts in 2006 drafted a preliminary convention as a starting point for discussion among member states (the draft is still being considered by member states, and is yet to be adopted).[10] The *Draft Convention on the Criminal Accountability of United Nations Officials and Experts on Mission* (Draft Convention) does not consider the accountability of military contingent members.[11] However, it is useful to examine in regard to jurisdictional issues and how the Group of Legal Experts envisioned a combined effort between the host state and troop-contributing countries to hold offenders to account. Article 4 of the Draft Convention covers the establishment of jurisdiction. Establishing jurisdiction based on territory (crime

[7] Group of Legal Experts Report, above n 4, at [27].
[8] Where the crime takes place within the territory then that state has jurisdiction over that criminal act.
[9] Group of Legal Experts Report, above n 4, at [27(a)]-[27(d)].
[10] At [47]; *Criminal Accountability of United Nations Officials and Experts on Mission* GA Res A/Res/69/114 (2014).
[11] "Draft Convention on the Criminal Accountability of United Nations Officials and Experts on Mission" *Report of the Group of Legal Experts on Ensuring the Accountability of United Nations Staff and Experts on Mission with Respect to Criminal Acts Committed in Peacekeeping Operations,* GA A/60/980 (2006) Annex III [Draft Convention].

committed within state territory) and nationality (offender as a national of that state) is mandatory under art 4(1). Article 4(2) provides that states may also establish jurisdiction based on passive personality (victim is a national) or over a stateless person within their territory. Article 4 would make concurrent jurisdiction possible; two states having jurisdiction operating at the same time over a particular offence. The Draft Convention does not attempt to resolve concurrent jurisdiction by prescribing primary or secondary jurisdiction, however it does include an "extradite or prosecute" provision.

Article 4(4) of the Draft Convention provides that:

> Each State party shall likewise take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 3 in cases where the alleged offender is present in its territory and it does not extradite such person pursuant to article 8 to any of the States parties which have established their jurisdiction in accordance with paragraphs 1 or 2 of the present article.

Together with art 7, this provision requires states parties to either exercise criminal jurisdiction over the accused or extradite that person to a state which also has jurisdiction to do so. It also provides universal jurisdiction if states parties chose to establish such jurisdiction over crimes included in the Draft Convention.[12] Articles 10 and 16 envision mutual legal assistance between states parties during the exercise of criminal jurisdiction. There is no obligation to prosecute unless double criminality exists (where the conduct is deemed a crime in both the host state and TCC domestic criminal law).[13]

[12] Such crimes include conduct related to sexual exploitation and abuse, see Draft Convention, above n 11, art 3; see also M O'Brien "Issues of the Draft Convention on the Criminal Accountability of United Nations Officials and Experts on Mission" in N Quenivet and S Shah-Davis (eds) *International Law and Armed Conflict: Challenges in the 21st Century* (YMC Asser Press, The Hague, 2010) 57, at 72.
[13] Draft Convention, above n 11, art 9; R S Clark "Peacekeeping Forces, Jurisdiction and Immunity: A Tribute to George Barton" (2012) 43 *Victoria University of Wellington Law Review* 77 at 95.

The Draft Convention seems to encourage states to modify their criminal law to incorporate extraterritorial jurisdiction over the prescribed crimes.[14] Moreover, the Draft Convention supports the mutual cooperation between states to hold perpetrators to account in terms of whichever state exercises their criminal jurisdiction. This mutual cooperation between states has been highlighted many times by state representatives during General Assembly discussions on the Draft itself.[15] Overall, the Draft Convention is the Group of Legal Experts' attempt at prioritising host state jurisdiction and promoting cooperation among states parties. If the Draft is adopted at some point in the future, it could prove a useful alternative to TCC exclusive criminal jurisdiction (if military contingent members were also included within its scope, which has not been suggested so far). However, arguably the Draft does not provide an adequate structure to incorporate host state jurisdiction as much of its application is dependent on whether sexual exploitation and abuse is a crime in either or both of the host state and the TCC and whether extradition treaties exist between such states. Therefore, there will likely be a gap where sexual exploitation is concerned, as survival sex is unlikely to be deemed a crime. Moreover, where concurrent jurisdiction exists, the Draft Convention does not address whether the host state will have primary or secondary jurisdiction. Such concurrent jurisdictional agreements have been embraced by the North Atlantic Treaty Organisation (NATO) under their SOFAs.

Outside the context of UN peacekeeping, concurrent jurisdiction agreements (where jurisdiction is shared between the sending and receiving states) are common for foreign military forces operating abroad.[16] Although something to be negotiated between parties, the default in

[14] Clark, above n 13, at 96.
[15] See for example, General Assembly *Summary record of the 6th Meeting* GA/C.6/62/SR.6 (2007); General Assembly *Summary Record of the 5th Meeting* GA A/C.6/63/SR.5 (2008); General Assembly, *Summary Record of the 7th Meeting* GA A/C.6/64/SR.7 (2009).
[16] P J Conderman "Jurisdiction" in D Fleck (ed) *The Handbook of the Law of Visiting Forces* (Oxford University Press, New York, 2001) 99; A P V Rogers "Operational Context" in D Fleck (ed) *The Handbook of the Law of Visiting Forces* (Oxford University Press, New York, 2001) 533.

such agreements is to prioritise the primary jurisdiction of the host state (where offences are committed outside the performance of official duties).[17] Such offences would include crimes of a sexual nature. Concurrent jurisdiction agreements are used to reconcile the two principles of jurisdiction that operate at the same time; the host/receiving state has territorial jurisdiction (as the crime is committed within their territory) and the sending state has the right to exercise jurisdiction over their own national personnel.[18] Such concurrent jurisdiction agreements have been suggested[19] as an alternative arrangement for including the host state in responding to crimes committed by military contingent members in the context of UN peacekeeping operations.

The NATO-SOFA recognises the primary jurisdiction of the host state in certain circumstances and incorporates concurrent jurisdiction.[20] Article VII of the NATO-SOFA provides that where an offence is committed outside the performance of official duties, and/or is committed against a national, and is covered by the laws of both sending and receiving states, the receiving state has primary jurisdiction.[21] The sending state has secondary jurisdiction which will operate where the host state has waived its jurisdiction or has been unwilling or unable to exercise it.[22] Members of both parties are expected to cooperate with each other on the arrest and investigation of military personnel.[23] Moreover, if trial can be brought by the host/receiving state then the rights of the accused for a fair trial must be substantively guaranteed.[24]

[17] Rogers, above n 16, at 550.
[18] Conderman, above n 16, at 103.
[19] See for example, M Du Plessis and S Pete "Who Guards the Guards?" (2010) 13 *African Security Review* 4 at 6.
[20] North Atlantic Treaty Organization *Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces* (entered into force 19 June 1951): [NATO-SOFA]. See generally E G Schuck "Concurrent Jurisdiction under the NATO Status of Forces Agreement" 57 *Columbia Law Review* 355; J H Rouse and G B Baldwin "The Exercise of Criminal Jurisdiction under the NATO Status of Forces Agreement" (1957) *The American Journal of International Law* 29.
[21] NATO-SOFA, art VII (3)(b).
[22] At art VII (3)(c).
[23] At art VII (6).
[24] At art VII (9).

Despite the NATO-SOFA, supplementary agreements are often sought by NATO members to waive the primary jurisdiction of the receiving state and/or establish exclusive jurisdiction of the sending state.[25] The United States is an example of a NATO member which regularly seeks such agreements.[26] Moreover, in modern practice, NATO has opted for exclusive criminal jurisdiction for sending states in SOFAs, but maintains mutual investigatory assistance clauses.[27] Therefore, the NATO agreements do not often follow through on the host state jurisdiction provisions.

The NATO-SOFA and its concurrent jurisdiction arrangements can also be distinguished from UN peacekeeping operations. NATO-SOFAs are reciprocal agreements, governing the permanent stationing of allied forces, thus the receiving state will often be granted similar immunities.[28] This is quite different to UN peacekeeping military contingent members who operate independently from host state forces on a temporary basis and often on rotation.[29] Therefore, it may not be appropriate to directly compare the two status-of-forces agreements as they serve slightly different purposes. However, the NATO-SOFA does illustrate that prioritising host state jurisdiction in regard to responding to criminal activity can be achieved via international agreements.

After the Group of Legal Experts' Report, academics discussed whether the host state should have primary or secondary jurisdiction over foreign military troops in the context of UN

[25] The United States policy is to require such agreements before military forces are sent see Conderman, above n 16, at 112.
[26] See International Security Advisory Board *Report on Status of Forces Agreements* (United States Department of States, 2015) at 16-19.
[27] Particularly where governance on the host/receiving state is in question see for example North Atlantic Treaty Organization *Agreement between the North Atlantic Treaty Organisations and the Islamic Republic of Afghanistan on the Status of NATO-led activities in Afghanistan* (entered into force 30 September 2014) at art 11. Such arrangements are often criticised by human rights NGOs see for example Amnesty International "Afghanistan: No Justice for Thousands of Civilians Killed in US/NATO Operations" (news release, 11 August 2014).
[28] R Burke "Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity" (2011) 16 *Journal of Conflict & Security Law* 63 at 77.
[29] At 77-78.

peacekeeping.[30] Some academics consider host state jurisdiction advantageous for practical reasons, such as the proximity to the victim/s and witnesses, and evidence, and the principled reason that victims will see justice being done.[31] However, there are certain challenges associated with host state jurisdiction. An example of a particular challenge is securing custody of peacekeeping personnel who may have been redeployed or otherwise outside the host state territory.[32] Additionally, host states may not be in a position to exercise criminal jurisdiction due to ongoing conflict or post-conflict, for example, the legal infrastructure may be weakened by political corruption or physically destroyed.[33] Moreover, any legal system still functioning may well not have the human rights guarantees and procedures in place to deliver due process.[34]

The Group of Legal Experts noted that "jurisdiction is not an indivisible concept".[35] To exercise criminal jurisdiction involved different components, such as arrest, investigation, prosecution, and sentence.[36] Therefore, the host state may well be able to carry out some of these steps regardless of a weakened judicial infrastructure. The importance of mutual legal assistance and cooperation between the host state, UN and TCC investigatory teams was highlighted as a way to bridge the gap caused by a compromised criminal justice system.[37]

Additionally, a 2009 Stimson Center Report, *Improving Criminal Accountability in United Nations Peace Operations*, argued that host state (secondary) jurisdiction should be supported

[30] See for example K J Allred "Peacekeepers and Prostitutes: How Deployed Forces Fuel the Demand for Trafficked Women and New Hope for Stopping It" (2006) 33 *Armed Forces & Society* 5; Clark above n13; A J Miller "Legal Aspects of Stopping Sexual Exploitation and Abuse in UN Peacekeeping Operations" (2006) 39 *Cornell International Law Journal* 71; M Ndulo "The United Nations Response to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers During Peacekeeping Missions" (2009) 27 *Berkeley Journal of International Law* 127; M Odello "Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers" (2010) 15 *Journal of Conflict & Security Law* 347.
[31] Ndulo, above n 30, at 153; Odello, above n 30, at 374.
[32] Ndulo, above n 30, at 153.
[33] At 155.
[34] Allred, above n 30, at 18; Miller, above n 30, at 92; Ndulo, above n 30, at 155.
[35] Group of Legal Experts, above n 4, at [40].
[36] At [41]-[42] see also Clark, above n 13, at 93-96.
[37] Group of Legal Experts Report, above n 4, at [40].

by the UN.[38] In response to criminal conduct committed by UN peacekeepers, the Stimson Center Report made recommendations aimed at improving accountability. Similar to the Group of Legal Experts, the Stimson Center Report limited its research to non-military personnel.[39] Additionally, the Report recommended that primary jurisdiction should remain with troop-contributing countries and the host state having secondary jurisdiction in circumstances where the TCC does not have extraterritorial jurisdiction over the crime in question (unable to investigate or prosecute) or does not agree to prosecute (unwilling).[40] However, unlike the Group of Legal Experts, the Stimson Center Report recommended that host state jurisdiction should be assisted by a UN organ specifically created to support host state judicial systems ("Justice Support Division").[41] Such logistical support would be in addition to a roster of international expertise available to fill any gaps in the host state system.[42] A support mechanism centralised in the UN would help in circumstances where the host state's domestic judicial infrastructure is weakened due to ongoing conflict or post-conflict, and provide clear UN leadership. Nevertheless, the Stimson Center Report's proposals are dependent on whether sexual exploitation and abuse are crimes in the domestic law of either the TCC or the host state. Moreover, unlike the Draft Convention, it has yet to be to be tabled or discussed at the UN.

The Group of Legal Experts' Draft Convention suggest a system of cooperation between the UN, host state and TCC whilst prioritising host state jurisdiction, but it does not offer a formal structure.[43] Instead, ad hoc arrangements are recommended.[44] The Stimson Center Report goes

[38] W J Durch, K N Andrews, M L England and M C Weed *Improving Criminal Accountability in United Nations Peace Operations* (STIMSON Center Report, Washington, 2009): [Stimson Center Report]. The Stimson Center is a non-profit organisation based in the United States which periodically publishes reports aimed at improving international peace and security.
[39] At xi.
[40] At xiii.
[41] At xvi.
[42] At xvi.
[43] Although hybrid courts are mentioned and recommended to be "considered" without further developing this idea see Group of Legal Experts Report, above n 4, at [33]-[37] and [44c].
[44] At [44b]; See also generally *Criminal Accountability of United Nations Officials and Experts on Mission* (2014), above n 10.

a step further and suggests host state jurisdiction supported by a centralised UN organ especially created for the purpose of filling gaps in expertise and logistical assistance to the host state's juridical system.[45] However, I argue that a formal judicial structure may be more advantageous if the goal is to achieve accountability while also incorporating the jurisdiction of the host state and TCC (thus, I argue for a special court for peacekeepers in Chapter Eight). Moreover, host state jurisdiction relies on the host state's criminal laws to cover sexual exploitation and abuse. It is unlikely that aspects of sexual exploitation, particularly survival sex, would be covered adequately in domestic criminal law of host states.

CONCLUSION

Although host state jurisdiction is desirable (and reflects the key principles that guide this thesis, particularly justice being seen to be done and host state ownership), it is not satisfactory without structural measures in place to facilitate it. Purely relying on host state jurisdiction may not be possible in practice; the host state's legal infrastructure may be weakened or compromised due to conflict or post-conflict. The Group of Legal Experts' Draft Convention, the NATO-SOFA and the Stimson Center Report illustrate ways in which host state jurisdiction can be incorporated into international agreements or supported, and as such may be achieved in the UN Peacekeeping context through amending both the UN Model-SOFA and the Memorandum of Understanding or simply adopting a version of the Draft Convention. These are possible alternative ways to exercise criminal jurisdiction over military contingent members who commit sexual exploitation and abuse. However, I argue that these options do not go far enough in offering a structural system in which to support cooperation between the UN, host states and TCCs while also incorporating host state ownership and, in some circumstances, host state jurisdiction. Arguably, a judicial tribunal of some kind should provide such a

[45] Stimson Center Report, above n 38, at xvi-xv.

structure; for example, the International Criminal Court (discussed in Chapter Seven) or a new court for peacekeepers (discussed in Chapter Eight).

CHAPTER SEVEN: THE INTERNATIONAL CRIMINAL COURT

INTRODUCTION

The International Criminal Court (ICC) has been discussed by many commentators as a legitimate option for increasing the accountability of peacekeepers, particularly for crimes of a sexual nature.[1] It has been argued that where the troop-contributing country is unwilling or unable to prosecute their nationals for sexual exploitation and abuse, the ICC should be considered.[2] It has been equally argued that extending the jurisdiction of crimes currently listed is unlikely and that perhaps it is better to amend the Rome Statute in order to incorporate the prosecution of sexual exploitation and abuse by peacekeepers.[3] Such a considerable call within the academic literature therefore requires serious consideration. In this chapter I will discuss these theories and put forward the major limitations to ICC jurisdiction. I argue that the International Criminal Court in its current form is unsuitable for the prosecution of peacekeepers for sexual exploitation and abuse.

Although there are pragmatic advantages to the ICC having jurisdiction, such as the existence of a judicial infrastructure and agreed standards of investigation and trial, there

[1] R Burke "UN Military Peacekeeper Complicity in Sexual Abuse: The ICC or a Tri-Hybrid Court" in M Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl, Beijing, 2012) 317; M Du Plessis and S Pete "Who Guards the Guards? The ICC and Serious Crimes Committed by United Nations Peacekeepers in Africa" (2004) 12 *African Security Review* 5; M O'Brien "Sexual Exploitation and Beyond: Using the Rome Statute of the International Criminal Court to Prosecute UN Peacekeepers for Gender-based Crimes" (2011)11 *International Criminal Law Review* 803; N Quenivet "The Role of the International Criminal Court in the Prosecution on Peacekeepers for Sexual Offences" in R Arnold (ed) *Law Enforcement within the Framework of Peace Support Operations* (Konihklijke Brill NV, Leiden, 2008) 399; R A Vezina "Combating Impunity in Haiti: Why the ICC Should Prosecute Sexual Abuse by UN Peacekeepers" (2012) 1 *Ave Maria International Law Journal* 431.

[2] O'Brien "Sexual Exploitation and Beyond", above n 1, at 808; Burke, above n 1, at 320; Vezina, above n 1, at 447.

[3] On the problems with ICC jurisdiction see A Harrington "Victims of Peace: Current Abuse Allegations against UN Peacekeepers and the Role of Law in Preventing them in the Future" (2005) 12 *ILSA Journal of International & Comparative Law* 125, 140-143; see also O'Brien "Sexual Exploitation and Beyond", above n 1, 826; Quenivet, above n 1, at 411.

are three major barriers complicit with ICC current jurisdiction and procedure that would mean it is unlikely the Court would prosecute peacekeepers for sexual exploitation and abuse. The first possible limitation is that ICC jurisdiction is currently restricted to international crimes. Although some authors have argued that the Rome Statute should be amended to include sexual exploitation and abuse by peacekeepers,[4] this is unlikely given the drafting history of the Rome Statute (the ICC's constituent document). A second hurdle to prosecution by the ICC is the complementarity principle which portends that the Court shall only intervene in cases where member states are unable or unwilling to prosecute. Thirdly, the discretion of the ICC Prosecutor which potentially operates to limit admissibility based on the ranking of personnel involved and the gravity of the crime(s) committed will also be a major limitation to the application of the Court in cases of sexual exploitation and abuse by peacekeepers.

Additionally, assessing the International Criminal Court option in light of the three principles identified in Part One means the ICC is unsatisfactory. It is important to note at the outset that the ICC does not give the UN an opportunity to show leadership. The UN has very little control over the work of the Court itself. Moreover, the host state is unlikely to have ownership over the process as the ICC is physically located in The Hague. Additionally, unless an effective outreach programme is employed, victims may not hear about cases or see justice being done. Overall, although a desirable option to improve accountability of military contingent members who commit sexual exploitation and abuse, the ICC is unlikely to actually improve accountability at all.

[4] O'Brien, "Sexual Exploitation and Beyond", above n 1, at 808; Burke, above n 1, at 320; Vezina, above n 1, at 447.

(1) THE CRIMES WITHIN ICC JURISDICTION

The jurisdiction of the International Criminal Court is set out under Part II of the Rome Statute.[5] The listed crimes are limited to genocide, crimes against humanity, war crimes and the crime of aggression.[6] As has been discussed in Chapter Two, gender-based crimes have been included under genocide, crimes against humanity and war crimes and these are described in arts 6 to 8 under the Statute.[7] The inclusion of gender-based crimes is an important aspect of the International Criminal Court, as stated by the UN Secretary-General in 2005 "sexual-based violence which may have occurred before, during and after conflict can seriously jeopardise peacebuilding efforts during this early phase".[8] Sexual exploitation by UN peacekeepers can fall into this general concern. However, the ICC has been constructed with a narrowly defined jurisdiction that will exclude sexual exploitation by peacekeeping personnel.

It was noted eariler that many forms of sexual exploitation and abuse are committed in the context of opportunistic situations. Although it is possible, it is nevertheless unlikely that sexual exploitation and abuse by peacekeepers would fulfil the requirements of rape or sexual violence under the international crimes described above.[9] These requirements include that the sexual exploitation committed be "directed towards a civilian population as a whole", a "widespread and systematic attack" and/or have evidence that the abuse was part of an overall policy.[10] However, some authors[11] have argued that sexual abuse and sexual

[5] *Rome Statute of the International Criminal Court* 2187 UNTS 3 (opened for signature 17 July 1998, entered into Force 1 July 2002): [Rome Statute].
[6] Rome Statute, art 6 (genocide), art 7 (crimes against humanity), art 8 (war crimes), art 8 *bis* (definition of crime of aggression adopted in 2010).
[7] Rome Statute arts 6(b) and (c),7(1)(g), 8(2)(b)(xxii) and 8(2)(c)(vi).
[8] *United Nations World Summit Outcome* GA Res A/Res/60/1 (2005).
[9] But see Burke, above n 1; Du Plessis and Pete, above n 1; O'Brien "Sexual Exploitation and Beyond", above n 1.
[10] Rome Statute, art 7.
[11] O'Brien, "Sexual Exploitation and Beyond", above n 1, 826; Quenivet, above n 1, at 411.

exploitation should be included in the Rome Statute, if not interpreted as crimes against humanity or war crimes specifically then be included as separate crimes.

(2) A New Crime of Sexual Exploitation by Peacekeepers?

Looking at the drafting history of the Rome Statute reveals that tightly defined crimes were preferred in order to gain widespread agreement across many states. Although at the negotiation stage some states preferred a broad range of crimes, it became apparent that in order to reach consensus the listed crimes would need to be clearly and narrowly defined.[12] Additionally, the agreed list represented the most serious international crimes of universal concern or so-called "core" crimes.[13] Such a narrow window in which to introduce new crimes will hinder sexual exploitation and abuse by peacekeepers being adopted into the Rome Statute. Nevertheless, it is possible for the Rome Statute to be amended in order to extend its jurisdiction or add new crimes.

A mechanism on hand to make such changes is by agreement of the Assembly of State Parties (ASP) at a Review Conference on the Rome Statute, the first of which was held in 2010.[14] The ASP acts as the legislative body to the Rome Statute. Therefore, any new crime would need the support of these states. Proposals for new crimes are considered by the Working Group on Amendments (WGA).[15] There have been several such proposals, including for terrorism and drug trafficking, but to date, none have been successful.[16]

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[12] B Broomhall *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, Oxford, 2003) at 76; Rome Statute, art 5.
[13] T Otto "The Object of Review Mechanisms: Statutes' Provisions, elements of Crimes and Rules of Procedure and Evidence" in R Bellelli (ed) *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (Ashgate, Surrey, 2010) 355 at 370.
[14] Rome Statute, art 121.
[15] *Official Record of the Assembly of State Parties to the Rome Statute of the International Criminal Court* ICC-ASP/8/Res.6 (2011).
[16] *Proposal for the inclusion of the Crime of Terrorism in the Rome Statute* ICC-ASP/10/32 Annex III (2011); *Trinidad and Tobago and Belize* ICC-ASP/10/32 Annex IV (2011) (on drug trafficking).

The Working Group considers new crimes with certain principles in mind in order to appropriately justify their inclusion in the Rome Statute alongside genocide and crimes against humanity. Additional crimes proposed by states should attract universal condemnation.[17] For example, the drug trafficking proposal has been described by some states as traditionally a domestic law issue.[18] Although its transnational nature means that trafficking of narcotic drugs affects more than one state, it is not generally considered to have universal impact.[19] This may have implications for "sexual exploitation" by peacekeepers as defined by the UN, which currently includes survival sex.[20] Transactional sex may be considered a purely domestic issue.

The "universal" aspect of sexual exploitation and abuse by peacekeepers could be supported by the very fact that UN peacekeepers represent the international community. The context in which sexual abuse occurs may also have an impact on the truly international character of such conduct. The position of trust and differential power present in the peacekeeper-beneficiary of assistance dynamic adds to a potentially coercive situation of post-conflict territories.[21] When sexual exploitation and abuse occurs, it can harm the relationship between the United Nations and the host state. Beyond this, sexual abuse can undermine the reputation of the UN in the eyes of the international community. However, the context still does not align with the unique characteristic associated with the current crimes listed; that the conduct be committed as part of a wider policy or is widespread and systematic.[22] As Harrington argues, the primary focus of the ICC when it was created was to prosecute

[17] *Resolutions and Recommendations adopted by the Assembly of State Parties* ICC-ASP/11/20 Annex II (2012) at [9] "In the case of a proposal for a new crime, the WGA particularly considers whether the crime can be characterised as one of the most serious crimes of concern to the international community as a whole an whether the crime is based on an existing prohibition under international law."
[18] *Report on the Working Group on Amendments* ICC-ASP/10/32 (2011) at [19].
[19] At [19].
[20] UN Secretary-General's Bulletin *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, UN Secretariat ST/SGB/2003/13 (9 October 2003) [S-G Bulletin (2003)] at 1.
[21] O'Brien "Sexual Exploitation and Beyond", above n 1 at 826.
[22] Harrington, above n 3, at 143.

persons for political or military atrocities committed as part of a widespread and/or systematic attack on civilians or towards a particular group of civilians.[23] Generally, it was not envisioned that prosecutions of crimes committed outside this context would be tried by the ICC.[24] The current critique of the proposals for terrorism and drug trafficking supports this conclusion.[25]

A new provision in the Rome Statute may be justified by pointing to the increased international attention paid to the protection of human rights during and after armed conflict. The importance of human rights is pointed out in the Rome Statute itself and in all resolutions adopted by the Assembly of State Parties.[26] At the time of state negotiations the inclusion of gender-based crimes was evidence of progressive drafting.[27] However, the definitions themselves had already been thoroughly discussed in both ad-hoc international tribunals; International Criminal Court for the Former Yugoslavia (ICTY)[28] and the International Criminal Tribunal for Rwanda (ICTR).[29] Therefore, there was sufficient legal support for their inclusion. The same cannot be said for sexual exploitation and abuse by peacekeepers. As discussed previously, not all forms of sexual exploitation and abuse are reflected in human rights treaties. There is no universally agreed definition.

Any definition of sexual exploitation and abuse by peacekeepers proposed may be problematic. In the case of the terrorism proposal to the Working Group on Amendments, it was an important factor that there was no universally agreed definition of "terrorism".[30] It

[23] At 143.
[24] At 143.
[25] *Report on the Working Group on Amendments,* above n 18, at [16] and [21].
[26] *Strengthening the International Criminal Court and the Assembly of State Parties* ICC-ASP/11/Res.8 (2012) at 45; Rome Statute, arts 21(3), 36(3)(b)(ii) and 69(7).
[27] S Ratner, J Abrams and J Bischoff *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (3rd ed, Oxford University Press, New York, 2009) at 234.
[28] *Prosecutor v Furundzija (Judgment)* ICTY Trial Chamber IT-95-17/1-T, 10 December 1998.
[29] *The Prosecutor v. Jean-Paul Akayesu (Judgment)* ICTR Trial Chamber ICTR-96-4-T, 2 September 1998.
[30] *Report on the Working Group on Amendments*, above n 18, at [14].

has been argued by O'Brien and Quenivet that a "criminal" definition of sexual exploitation and abuse could be developed from the UN Secretary-General's *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* (S-G Bulletin).[31] As argued in Chapter Two, the definition of sexual exploitation in particular under the Bulletin is ambiguous and highly criticised in feminist scholarship. Survival sex as a discrete notion is not found anywhere else in international law. This would have a dramatic impact on any proposed universal definition. Additionally, the S-G Bulletin is not drafted with the intention of being a basis for criminal prosecution but is instead a creature of policy. Again, there is no universally agreed definition in which to draw an international crime.

Overall, the truly international character of sexual exploitation and abuse by peacekeepers may only be argued on the basis of the context in which the abuse arises. However, from reviewing the past assessment of proposed crimes by the WGA, sexual exploitation may be criticised by the Working Group as to the opportunistic nature of its occurrence. Moreover, the definition of sexual exploitation in its current form (in the S-G Bulletin) is problematic if one wanted to pull a new provision from what is already available. The lack of universal agreement on the definition or even criminalisation of some forms of sexual exploitation, such as survival sex, also poses a challenge to a new provision. If in the unlikely circumstance a new provision governing sexual exploitation by peacekeepers was accepted into the Rome Statute, ICC prosecution would nevertheless be hindered by other aspects of the Court's procedure.

[31] O'Brien "Sexual Exploitation and Beyond", above n 1, at 826; Quenivet, above n 1, at 411.

(3) COMPLEMENTARITY PRINCIPLE

The principle of complementarity is considered fundamental to the International Criminal Court.[32] This principle deals with the ICC's relationship with national courts. Essentially the Court cannot investigate or prosecute a case unless a state which has jurisdiction over it is unable or unwilling to do so.[33] Even then the ICC Prosecutor must notify states which have jurisdiction of his/her intention to prosecute.[34] Additionally, an offender cannot be tried in the ICC if the case has already been heard in a national court.[35] The complementarity principle is specified in art 17 of the Rome Statute which also details in what circumstances a state is considered "unwilling" or "unable" to investigate and prosecute. A state is deemed "unwilling" to investigate or prosecute if the alleged offender is being shielded by that state, if there is unjustified delay in bringing an investigation or prosecution or if proceedings are impartial.[36] A total collapse of legal or administrative institutions would render a state "unable" under the Rome Statute.[37] Overall, the International Criminal Court is meant to be a Court of "last resort".[38]

The complementarity principle aligns with the current situation for sexual crimes committed by military contingent members ie that the troop-contributing state has primary jurisdiction. However, the principle also signifies that the Court has secondary jurisdiction over the limited set of crimes, something that TCC "exclusive jurisdiction" described in the various agreements with the UN does not take into account. If a new provision were to be adopted into the Rome Statute, then these agreements would need to be re-drafted/negotiated.

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[32] *Report of the Bureau on Stocktaking: Complementarily* "Taking Stock of the Principle of Complementarity: Bridging the Gap" ICC-ASP/8/20/Add.1 (2010) at [3].
[33] Rome Statute, art 17(1)(a).
[34] Rome Statute, art 18(1).
[35] Rome Statute, arts 17(1)(c) and 17(1)(d).
[36] Rome Statute, art 17(2)(a)-(c).
[37] T H McCormack and S Robertson "Jurisdictional Aspects of the Rome Statute for the New International Criminal Court" (1999) *Melbourne University Law Review* 635 at 645.
[38] *Report of the Bureau on Stocktaking: Complementarity*, above n 32, at [3].

Applying the complementarity principle to sexual exploitation and abuse by peacekeepers would be beneficial as TCC inaction would be remedied with the Court's secondary jurisdiction. A contributing state would also need to ensure the new crime is considered a "crime" under their domestic criminal law in order to avoid being deemed "unable" to prosecute and thereby possibly triggering ICC jurisdiction.[39] Moreover, it is important to note that the International Criminal Court also has the advantage of an established judicial system, with agreed standards of investigations and trials.[40] Judges, registrars and other related personnel are already sourced and a budget already in place. This can be contrasted to establishing a new court or tribunal to deal with peacekeeping crimes (discussed in Chapter Eight).

In order to ascertain whether a state is unwilling to unable to investigate or prosecute there would need to be evidence or monitoring in place.[41] Evidence could be attained through contributing states reports to the UN as required by the Memorandum of Understanding.[42] Therefore, some commentators argue that the knowledge that the ICC may investigate an allegation may at least encourage contributing states to comply with reporting obligations under the Memorandum of Understanding.[43] Moreover, the Rome Statute goes further than the MOU in relation to where such information can be obtained. The ICC Prosecutor for example may gather information from states themselves, non-governmental organisations (NGOs), inter-governmental organisations and "other reliable sources".[44] Additionally, it can be presumed that if contributing states continued to be unwilling to prosecute then the

[39] McCormack and Robertson, above n 37, at 645.
[40] The Rules of Procedure and Evidence, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court* ICC-ASP/1/3 and Corr. 1 Part II.A (New York, 2002).
[41] Du Plessis and Pete, above n 1, at 13. Rome Statute, art 14(2).
[42] *Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual)* GA A/c.5/66/8 (2011) ch. 9 Memorandum of Understanding [2007 MOU] art *sexiens* [7.24].
[43] Burke, above n 1, at 363; Du Plessis and Pete, above n 1, at 13.
[44] Rome Statute, art 15; see also McCormack and Robertson, above n 37, at 642.

ICC would have jurisdiction. Such jurisdiction of the Court is unlikely to be welcomed by many TCCs and so will encourage such states to genuinely investigate and prosecute cases of sexual exploitation and abuse.

However, the evidence and monitoring required in order to prove that a TCC is "unwilling" or "unable" to investigate or prosecute is a disadvantage flowing from the complementarity principle. As had been argued in previous chapters, contributing states have been lax in their reporting duties and the level of detail provided may vary state to state. As a result, reporting may not be a wholly reliable source of information. There may have to be further investigation into the reasons behind non-accountability. Such intrusive steps are likely to be rejected by TCCs, particularly when concerning the conduct of military contingent members. Moreover, the delay that will inevitably occur between the case being transferred to the TCC and the determination that the state has failed to investigate or prosecute in order to trigger ICC jurisdiction can lead to a number of issues. Such issues include the likelihood that the alleged offender, witnesses and even the victim have relocated or are otherwise difficult to locate in order to properly investigate the case. As a result, justice may never be seen to be done. For these reasons, the complementarity principle may mean that ICC jurisdiction does not in fact fill the accountability gap. A new court with the reversal of a complementarity system will be discussed in Chapter Eight.

(4) PROSECUTORIAL DISCRETION

As O'Brien rightly points out, prosecutorial discretion may be the most limiting factor on ICC prosecution of sexual exploitation and abuse by peacekeepers.[45] In order to safeguard the independence of the ICC Prosecutor considerable discretion has been granted under the

[45] M O'Brien "Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court: The Big Fish/Small Fish Debate and the Gravity Threshold" (2012) *Journal of International Criminal Justice* 525.

Rome Statute.[46] The Prosecutor may choose which cases or situations to investigate.[47] The crime(s) must be of sufficient gravity to warrant the exercise of ICC jurisdiction.[48] As part of prosecutorial discretion, the Prosecutor may consider a number of factors in order to assess the gravity of the crime(s) alleged.[49]

The gravity threshold described by the preamble of the Rome Statute dictates that the Court shall prosecute "the most serious crimes of concern to the international community as a whole" and such "grave" crimes that threaten international peace and security.[50] According to the ICC Prosecutor, the gravity of the crime/s is central for admissibility.[51] The importance of gravity is reiterated several times throughout the Rome Statute.[52] Overall, the policy favoured by the ICC Prosecutor is to focus on "representative rather than comprehensive" cases.[53] This means that not all cases that come within the jurisdiction of the Court will be investigated and/or prosecuted.

The ICC Prosecutor will favour prosecution of the most senior leaders rather than lower ranking officials or soldiers. The general policy of the Prosecutor is to focus on individuals who "bear the most responsibility".[54] This generally equates to higher-ranking officials.[55] Additionally, this recognises the reality that the "Court will never be able to prosecute all those responsible for crimes under its jurisdiction in a given situation."[56] This limitation also acknowledges the restricted resources and budget allocated to the Court itself.[57] Although it

[46] At 527.
[47] Rome Statute, art 15.
[48] Rome Statute, arts 17(1)(d), 53(1)(b) and 53(2)(b).
[49] O'Brien "Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court", above n 45, at 534-536.
[50] Rome Statute, Preamble.
[51] *Paper on some Policy Issues before the Office of the Prosecutor* ICC-OPT (2003) at 7.
[52] Rome Statute, Preamble, arts 17, 53, 59, 77, 78, 84, 85, 90 and 93.
[53] B Schiff *Building the International Criminal Court* (Cambridge University Press, New York, 2008) at 118.
[54] *Paper on some Policy Issues before the Office of the Prosecutor* ICC-OPT (2003) at 3 and 7.
[55] O'Brien "Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court", above n 45, at 528.
[56] *Report of the Bureau on Stocktaking: Complementarity* above n 32, at [12].
[57] At [15].

is unclear from statistics provided by the UN Secretary-General in his annual reports on sexual exploitation and abuse in peacekeeping, it can be assumed that not all allegations are directed towards high-ranking personnel.[58] A single act of rape by a low-ranking peacekeeper may not reach the required threshold. This general restriction in the assessment of gravity may severely limit ICC jurisdiction over peacekeepers.

The practice of the ICC Prosecutor indicates that the number of victims is a highly valued factor when assessing gravity.[59] As noted by both Burke and O'Brien, this may considerably limit the admissibility of sexual exploitation and abuse by peacekeepers.[60] The number of victims per allegation is unlikely to be high. Moreover, in dismissing a potential case the Prosecutor has pointed out the number of victims of current cases before the Court to be in the hundreds or thousands. Waiting for such a "magic number" of victims is particularly unsatisfactory as it is not the number of victims of sexual exploitation and abuse that is concerning, it is the fact that these abuses happen at all. In circumstances where the local population is meant to be protected by peacekeepers, acts of sexual exploitation and abuse committed by these "protectors" is the most alarming aspect of such violations. One victim should be enough to be a valued factor when assessing gravity. For sexual exploitation and abuse to be considered then a different approach would need to be taken by the Prosecutor in assessment of gravity, such as the nature of the crimes themselves or the impact on the victim and their communities or the violation of trust in the peacekeeping mandate.[61]

[58] O'Brien, "Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court", above n 45, at 531.
[59] At 531.
[60] Burke, above n 1, at 348-350;
[61] O'Brien, "Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court", above n 45, at 535.

Burke and O'Brien's counterargument to the barrier prosecutorial discretion presents is an interesting one and deserves discussion.[62] Peacekeepers are potentially given special status under the Rome Statute via art 8(2)(e)(iii):

> Intentionally directing attacks against buildings, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection to the protection given to civilians or civilian objects under the international law of armed conflict.

This provision has been used once in connection to a case against two rebel leaders of a movement (JEL-CL) in Sudan which allegedly carried out an attack killing twelve peacekeepers.[63] The number of victims in this case was few. However, as the victims in this case were peacekeepers they were looked at as having a special status and thus had an impact on the Prosecutor's assessment of gravity. O'Brien argues that because peacekeepers have special status as victims, thereby having a bearing on the assessment of "gravity", then the same should apply to peacekeepers as offenders.[64] However, this provision does not apply to all peacekeepers. Where the mandate of the mission requires peacekeepers to take the role of "combatants" or allows for self-defence they will be considered part of the conflict and will not be afforded special protection.[65] Consequently, Burke and O'Brien's counterargument would result in unequal distribution of justice as this "special status" may apply to one group of peacekeepers, but not to others. This is unsatisfactory. This "special

[62] Burke, above n 1, at 357; O'Brien "Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court", above n 45, at 532-533.
[63] M Bangura "Prosecuting the Crime of Attack on Peacekeepers: A Prosecutor's Challenge" (2010) 23 *Leiden Journal of International Law* 165 at 174.
[64] O'Brien "Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court", above n 45, at 533.
[65] Bangura, above n 63, at 168.

status" would need to apply to peacekeepers as a group, regardless of whether they are party to armed conflict or not.

(5) Other limiting factors

Purely international tribunals such as the International Criminal Court also have other disadvantages. The ICC is unlikely to have any link to the victim or their community in terms of personnel or location.[66] The legitimacy of the Court's decisions may therefore be brought into question with justice not being seen to be done.[67] Moreover, the Court will have similar disadvantages to exclusive TCC jurisdiction, such as practical difficulties associated with investigating and gathering evidence in a foreign state. However, unlike TCCs, the International Criminal Court specialises and has extensive experience in the investigation of cases in foreign countries.[68] Furthermore, the reason behind the limitation in admissibility is partly to do with limited resources (financial, administrative, and human) at the ICC's disposal. Unfortunately, the Court can simply not hear all deserving cases. This reality will also hinder an argument for peacekeepers to be prosecuted for sexual exploitation and abuse at the ICC. The International Criminal Court is unsatisfactory when assessing its jurisdiction in light of the three principles identified in Part One. Unless an effective outreach programme is employed, victims may not hear about cases or see justice being done. Moreover, the host state and the UN would not have an active role in the operations of the ICC and its trials.

[66] R Lipscomb "Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan" (2006) 106 *Columbia Law Review* 182 at 193.
[67] At 196.
[68] International Criminal Court "Investigations" (2015) <www.icc-cpi.int>.

CONCLUSION

Having discussed the relevant theories on the potential for the International Criminal Court to deal with sexual exploitation and abuse by peacekeepers, I argued that it is unlikely the ICC can provide a legitimate avenue for filling the accountability gap. It is doubtful that sexual exploitation and abuse by peacekeepers will fit within the narrowly defined crimes currently listed in the Rome Statute. Furthermore, to attempt to introduce a new provision into the Statute would be challenging given the lack of universality attached to the crimes and agreed definition. The complementarity principle means that the ICC may have secondary jurisdiction, however the required evidence to prove that a TCC is "unable" or "unwilling" to prosecute their nationals would mean long delays and possibly intrusive monitoring. Finally, prosecutorial discretion favours high-ranking officials and a higher number of victims in the assessment of "gravity". For these reasons, ICC jurisdiction is unlikely to be effective means of holding peacekeepers to account for sexual exploitation and abuse.

CONCLUSION TO PART THREE

This Part has demonstrated that two potential options for improving accountability, ie host state jurisdiction and the International Criminal Court are unsatisfactory for different reasons. Chapter Six illustrated the challenges associated with trying to fit sexual exploitation and abuse by peacekeepers into the boxes of international crimes or the Rome Statute generally in order to come under the jurisdiction of the ICC. Moreover, Chapter Seven established that an alternative system which incorporates host state jurisdiction is conceptually beneficial; victims and their communities will see justice being done and host state ownership may be facilitated. However, host state jurisdiction may not always be practically possible. Therefore, a structural system which supports cooperation between the UN, host states and TCCs while also incorporating host state ownership and, in some circumstances, host state jurisdiction may be a more appropriate alternative.

PART FOUR: TOWARDS A HYBRID SOLUTION? A SPECIAL COURT FOR PEACEKEEPERS AND THE ROLE OF VICTIMS

INTRODUCTION TO PART FOUR

Part Four continues with the second broad category of suggestions for improving accountability for sexual exploitation and abuse (alternative ways to prosecute military contingent members) by exploring a special court for peacekeepers. Additionally, Part Four considers the third broad category of suggested avenues for improving accountability; support and assistance for victims. Chapters Eight and Nine argue for a two-pronged system, of prosecution and victim reparations.

This Part will not only argue for a hybrid tribunal for peacekeepers, a measure that has been seldom considered, but also for a court with jurisdiction over military contingent members in the first instance, thereby avoiding the current exclusive criminal jurisdiction of TCCs. In Chapter Eight I will explore past and present examples of hybrid tribunals and how a similar structure will best serve the three underlying principles of justice being seen to be done, host state ownership, and UN leadership. I will also consider three potential hurdles, including the material jurisdiction of such a tribunal, political will and financial considerations.

As I am particularly interested in the perspective of victims, their communities, and the host state when exploring avenues for improving accountability, in Chapter Nine I will examine the situation of the victims of sexual exploitation and abuse. I will argue that in addition to a hybrid tribunal for peacekeepers, victims of sexual exploitation and abuse should also have

a participatory role. Moreover, that a reparations scheme should be implemented which aims to dismantle the structural inequalities that foster gendered violence.

The aim of Part Four is to illustrate that in order to fill the gap in the current framework for dealing with sexual exploitation and abuse by peacekeepers, where past UN reforms have seemingly failed, it is perhaps time for states to have uncomfortable conversations about TCC exclusive criminal jurisdiction over their troops. This requires consideration of alternative mechanisms, such as a hybrid court, and serious responses to victims of sexual exploitation and abuse that involve comprehensive support, assistance, and, where appropriate, transformative reparations.

CHAPTER EIGHT: A SPECIAL COURT FOR PEACEKEEPERS

INTRODUCTION

In this chapter I will continue to look at alternative avenues for investigation and prosecution of military contingent members for sexual exploitation and abuse; specifically, hybrid or tri-hybrid tribunal models. I will use the three principles identified in Part One which should underlie an alternative model for prosecution of military contingents for sexual exploitation and abuse; justice being seen to be done, host state ownership, and UN leadership. I argue that these principles are best served by a tribunal following a hybrid model. The arguments for a special tribunal for peacekeepers will be briefly noted in section (2) and the principles themselves are discussed in section (3).

In section (4) I look closely at hybrid tribunals. I will consider past and present examples of such tribunals (Kosovo, Sierra Leone, East Timor, and Cambodia) and compare common attributes to determine whether they are applicable to the peacekeeping context. I will further develop the model by looking at the tri-hybrid tribunal (cooperation between the UN, troop-contributing countries and the host state) in section (5).

One of the major differences between my suggested model and those that have been argued in previous scholarship is removal of the troop-contributing country's exclusive (or primary) criminal jurisdiction. Instead of a court of "last resort" I will argue for a court of first instance in Section (6). Moreover, I will discuss possible structure in terms of legal basis and jurisdiction. This will include a discussion on three potential barriers to a new court for peacekeepers; firstly, the material jurisdiction and possible offences within sexual

exploitation and abuse; secondly, the political will of states ie how will states sign up to a special court for peacekeepers; and thirdly, resourcing a special court for peacekeepers.

(1) International Criminal Justice – Limitations

Before exploring the proposal of a special court for peacekeepers, it is necessary to address the perceived limitations of international criminal justice in delivering "justice" to victims of sexual exploitation and abuse. Criminal institutions and courts have been criticised for re-traumatising victims of crimes of a sexual nature through the trial process.[1] Moreover, traditional criminal justice theory favours retribution and so places the prosecution of the offender at the centre of importance (discussed further in Chapter Nine).[2] Therefore, it has been argued that an emphasis on prosecution and incarceration as "justice" neglects other concepts of "justice" that may exist.[3] For some victims, "justice" may mean the prosecution of perpetrators, for others it may mean compensation for harm caused or the opportunity to have their stories heard and reported in a public setting.[4] These latter interpretations of "justice" align with restorative theories of criminal justice. As stated in Part One, it is not the intention of this thesis to propose a special court of peacekeepers as the only method of tackling sexual exploitation and abuse by peacekeepers. The individual criminal accountability of military contingent members is simply the focus of this particular thesis. However, in an attempt to mitigate the limitations of international criminal justice, and centralise victims, Chapter Nine will explore restorative measures and how they may fit into

[1] F Marsh and N Wager "Restorative Justice in Cases of Sexual Violence: Exploring the Views of the Public and Survivors" (2015) 62 *Probation Journal* 336 at 338; A Kasparian "Justice Beyond Bars: Exploring the Restorative Justice Alternative for Victims of Rape and Sexual Assault" (2014) 37 *Suffolk Transnational Law Review* 1.
[2] Marsh and Wager, above n 1, at 338.
[3] See generally, E Bernstein "Militarized humanitarianism meets Carceral Feminism" (2010) 36 *SIGNS* 45; E Bernstein "Carceral Politics as Gender Justice? The "Traffic in Women" and Neoliberal Circuits of Crime, Sex, and Rights" (2012) 41 *Theor Soc* 233.
[4] C McGlynn "*Feminism*, Rape and the Search for Justice" (2011) 31 *Oxford Journal of Legal Studies* 825 at 825.

a special court for peacekeepers. As the introduction of this Part explained, Chapters Eight and Nine are argued as a two-pronged system of both prosecution and reparations.

(2) The Argument for a Special Tribunal

After the release of the influential Zeid Report on sexual exploitation and abuse in 2005, the Special Committee for Peacekeeping Operations called upon a Group of Legal Experts to compile a list of recommendations to improve accountability of peacekeepers.[5] The subsequent report entitled: *Ensuring the Accountability of United Nations Staff and Experts on mission with Respect to Criminal Acts Committed in Peacekeeping Operations* was released in 2006.[6] The Group of Legal Experts discussed many different options for accountability, among them were hybrid tribunals.[7] However, the Group's terms of reference limited the focus of their report to the accountability of experts on mission and UN officials only; such personnel include UN staff and volunteers, UN police, military observers and advisers, military liaison officers, and consultants.[8] Therefore, the accountability of military contingents was not specifically examined, because of the then existing exclusive jurisdiction of the troop-contributing country.[9] However, the report is still useful for this current discussion and is the one of the few UN documents so far that seriously explores alternative ways to prosecute peacekeepers other than by the contributing state.

The Group of Legal Experts argued that "a new international judiciary with jurisdiction to deal with serious crimes by peacekeepers" could fill the accountability gap.[10] Moreover, in

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[5] UN Secretary-General, *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations* GA A/59/710, (24 March 2005) prepared by Prince Zeid Ra'ad Zeid Al-Hussein [Zeid Report] at [80].
[6] *Report of the Group of Legal Experts on Ensuring the Accountability of United Nations Staff and Experts on Mission with Respect to Criminal Acts Committed in Peacekeeping Operations* GA A/60/980 (2006): [Group of Legal Experts Report].
[7] At [33]-[39].
[8] At [7].
[9] At 8 footnote 5, and 9 footnote 8.
[10] The Group of Legal Experts Report ultimately dismissed the option due to the perceived limitations that will be discussed below see Group of Legal Experts Report, above n 6, at [76].

2015 Radhika Coomaraswamy, lead author of the global study on the implementation of Security Council Resolution 1325,[11] included among her recommendations related to Resolution 1325 the "establishment of a UN tribunal for sexual exploitation and abuse" for peacekeepers.[12] Coomaraswamy did not include any more information about her recommendation. So far, Roisin Burke has been one of the few academics to seriously tackle alternative trial mechanisms in the context of peacekeeping, specifically military contingent members.[13] Although only briefly mentioned by a few other scholars,[14] Burke has broadly explored the possibility of a hybrid or tri-hybrid tribunal to govern crimes committed by peacekeepers.[15] Burke has examined a mechanism with equal input from the UN, the TCC and the host state; a "tri-hybrid tribunal". I will assess critically the models that have been put forward by both the Group of Legal Experts' reports and Burke.

(3) Conceptual Foundation: The Three Principles Underlying a New Court for Peacekeepers

Before examining the various models that have been proposed, it is helpful to first consider why the three principles identified in Part One (justice being seen to be done, host state ownership, and UN leadership) should be reflected in a special court for peacekeepers.

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[11] Information on the Global Study is available online <http://wps.unwomen.org/en>; see also *Security Council resolution 1325* SC Res S/Res/1325 (2000).
[12] Radhika Coomaraswamy *Open Letter to Permanent Representatives of the Security Council dated 23 June 2015* (2015) at 4; this was reiterated in the 2015 report Radhika Coomaraswamy *Preventing Conflict, Transforming Justice, Securing the Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325* (2015) at 149 and 156-157.
[13] R Burke *Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current Status Quo and Responsibility under International Law* (Leiden, Brill, 2014); R Burke "UN Military Peacekeeper Complicity in Sexual Abuse: The ICC or a Tri-Hybrid Court" in M Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic EPublisher, Beijing, 2012) 317.
[14] A Cahillane "International Law, Sexual Violence and Peacekeepers" 17 *Irish Student Law Review* 1 at 14; T Innes "The Accountability of Peacekeeping Operations: A Focus on Allegations of Sexual Abuse" (2011) 1 *Warwick Student Law Review* 19 at 31; M Odello "Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers" (2010) 15 *Journal of Conflict & Security Law* 347 at 375; Office of the United Nations High Commissioner for Human Rights *Rule-of-Law Tools for Post-Conflict States: Maximising the Legacy of Hybrid Courts* (United Nations, New York and Geneva, 2008) at 4.
[15] Above n 13.

Much like host state jurisdiction discussed in Chapter Six, a tribunal established on the ground, within the community in which the victim(s) live(s), will enable these communities to see "justice being done".[16] Having suffered exploitative conduct, victims and their communities deserve to have their stories told and their abuser to be held to account in a local and public arena.[17] The visibility of victims themselves also supports serious recognition of the harm caused by sexual exploitation and abuse. Additionally, as discussed in Chapter Six, the *Draft Convention on the Criminal Accountability of the United Nations Officials and Experts on Mission* offers insight into how jurisdiction can be distributed via cooperation between the TCCs, UN and host states, although it does not go far enough in offering structural measures to achieve this. I argue that a hybrid tribunal may be an appropriate structural measure, particularly as it can serve the principle of host state ownership.

It has been suggested by the Office of the UN High Commissioner for Human Rights that hybrid tribunals for example contribute to the victim's right to justice and an effective remedy; witnessing prosecution of the alleged abuser can be considered part of this right.[18] Moreover, the practice of hybrid tribunals suggests a trend of encouraging affected states to actively participate in the process of accountability with the consequence that victims have a more vital role in international criminal justice.[19]

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[16] Cahillane, above n 14, at 14.

[17] This has been held to be one of the primary reasons behind the hybrid tribunals, for example the Special Court of Sierra Leone A Smith "Sierra Leone: The Intersection of Law, Policy, and Practice" in C P R Romano, A Nollkaemper and J K Kleffner (eds) *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press, Oxford, 2004) 125 at 127.

[18] *Rule-of-Law Tools for Post-Conflict States*, above n 14, at 4; Victims' rights to an "effect remedy" will be discussed below in Chapter Nine.

[19] S Williams *Hybrid and International Criminal Tribunals* (Hart Publishing, Oxford, 2012) at 59; T Becker "Address to the American International Law Association" (2004) 10 *ILSA Journal of International and Comparative Law* 477 at 479; P K Mendez "The New Wave of Hybrid Tribunals: A Sophisticated Approach to Enforcing International Humanitarian Law or an Idealistic Solution with Empty Promises?" (2009) 20 *Criminal Law Forum* 53 at 72-73.

The status quo means that the troop-contributing state has exclusive criminal jurisdiction; therefore, prosecution (if any) is likely to occur in a foreign country. Currently, the victim of sexual exploitation or abuse is not directly involved in the trial process beyond being a witness. Under the current model-Memorandum of Understanding, between the UN and TCCs, the contributing state is required to report on outcomes of cases.[20] These reports are inconsistent (and often non-existent);[21] at the very least this needs to change in order to improve transparency for victims and their communities. Under the status quo "justice is not seen to be done" and this is one of the primary principles that should underlie an alternative model.

Following on from the importance of victims (individual, community and host state) to see "justice being done", the host state should have ownership in any alternative trial system. Host state "ownership" in this instance does not necessarily mean that the host state should have primary jurisdiction over offending peacekeepers, but it should have a role in the functioning of the court or tribunal itself. The level or scope of ownership in the process may depend on each particular host state (according to financial and human resources available) and may include participation in investigation, prosecution teams, judges or administration.[22] Host state ownership in a judicial system of a hybrid kind would align with the UN's policy of inclusivity in peacebuilding.[23] Additionally, there are practical

[20] *Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual)* GA A/c.5/66/8 (2011) ch. 9 Memorandum of Understanding [2007 MOU] art 7 *sexiens* (1).
[21] Secretary-General *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* GA A/67/766 (2013) at [15].
[22] On the role of host ownership in transitional societies see M Saul "Local Ownership of the International Criminal Tribunal for Rwanda: Restorative and Retributive Effects" (2012) 12 *International Criminal Law Review* 427.
[23] See for example, Report of the Secretary-General *The Future of the United Nations Peace Operations: Implementation of the Recommendation of the High-Level Independent Panel on Peace Operations* GA A/70/375-S/2015/628 (2015) at [64]; *Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict* GA A/63/881-S/2009/304 (2009) at [7]-[14]; *Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict* GA A/64/866-S/2010/386 (2010) at [26]-[31]; *Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict* GA A/67/499-S/2012/746

advantages to having a tribunal on-site. The gathering and maintenance of evidence and the access to witnesses and the victim are made easier when the trial takes place in the same place as the sexual exploitation and abuse occurred. Justification for host state ownership in hybrid courts can also be based upon capacity-building and perceived legitimacy of the trial process.

Generally, it has been argued that hybrid tribunals have the ancillary benefit of helping with a state's capacity-building in situations of conflict or post-conflict.[24] In such situations, the presence of international personnel in the host state's legal system may assist with the reestablishment of the domestic justice system. Moreover, hybrid courts may also strengthen enforcement of human rights.[25] Conflict can also mean the loss of legal expertise and skills in the host state, a hybrid tribunal with its mix of domestic and international personnel can help with training of staff and lawyers as well as temporarily filling the skills-gap.[26] However, the capacity-building argument for a hybrid court may not be especially strong in the peacekeeping context. The value of training in a specialised court may be diminished due to the fact that a hybrid court created especially for the prosecution of crimes committed by military contingent members (almost certainly international personnel) may not be considered comparable to the domestic legal system.[27] Thus, the skills and expertise involved may not be relevant or particularly transferrable.

(2012); *Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict* GA A/69/399-S/2014/694 (2014) at [27]-[39]; inclusivity is discussed in Part One.

[24] See for example, Williams, above n 19, at 61-62.

[25] A Cassese "The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality" in C P R Romano, A Nollkaemper and J K Kleffner (eds) *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press, Oxford, 2004) 1 at 6; Odello, above n 14, at 375.

[26] Cassese, above n 25, at 6; Mendez, above n 19, at 74.

[27] J Herman, "A Necessary Compromise or Compromised Justice? The Extraordinary Chambers in the Courts of Cambodia" in H F Carey and S M Mitchell (eds) *Trials and Tribulations of International Prosecutions* (Lexington Books, Lanham, 2013) 209 at 216 where the author discusses the particular training given to nationals in the ECCC is not comparable or particularly relevant to the domestic legal system. See also Mendez, above n 19, at 88.

If the goal of a special tribunal is to improve accountability and thus have "justice being seen to be done" then the decisions of such a court should have legitimacy within the victim's community.[28] A stand-alone court that operates outside of the victim's community or host state may lack such legitimacy. Practice of purely internationalised tribunals has shown that outcomes of cases rarely resonate with the communities of the affected state; such has been the case with the International Criminal Court, and the international ad-hoc tribunals.[29] Without the judgments of cases reaching the affected community, the legitimacy of the tribunals themselves can be seriously questioned.[30] This is similar to the current state of affairs within the peacekeeping context; unless there is notable media coverage over cases, the outcome of TCC sexual exploitation and abuse cases rarely make it back to the community/host state.[31] A lack of transparency means a lack of legitimacy. Therefore, outreach programmes were established to raise awareness of the cases among victim communities to boost the image of the purely international tribunals.[32] These issues can be avoided if proceedings are visible to the affected communities. Additionally, legitimacy and "moral authority" would be more likely to be fostered if host state communities are consulted in the creation of a hybrid court.[33]

As the UN has the central role in any UN peacekeeping mission, it would follow that the organisation takes leadership in any new judicial system involving its peacekeepers. The

[28] L A Dickinson "Notes and Comments: The Promise of Hybrid Courts" (2003) *The American Journal of International Law* 295, at 301; Mendez, above n 19, at 70; Saul, above n 22, at 43.
[29] Dickinson, above n 28, at 302; Y Shany "How can International Criminal Courts Have a Greater Impact on National Criminal Proceedings? Lessons from the First Decades of International Criminal Justice in Operation" (2013) 46 *Israel Law Review* 431 at 440.
[30] Dickinson, above n 28, at 302; see also R Zachlin "The Failings of Ad Hoc International Tribunals" (2004) 2 *Journal of Criminal Justice* 541 at 544.
[31] See for examples of high profile cases highlighted by the media D Gayle "French Solider charged with Burkina Faso Child Abuse" *The Guardian* (4 July 2015) www.theguardian.com; R O Graces "Uruguay: Peacekeepers Accused of Sexual Abuse in Haiti Jailed" *Huffington Post* (11 September 2011) www.huffingtonpost.com.
[32] E Evenson "ICC Success Depends on its Impact Locally" *Human Rights Watch* (26 August 2015) www.hrw.org.
[33] Saul, above n 22, at 433.

United Nations, as a human rights promoter and through its leadership role in the international community, is best placed to implement a responsive system for sexual exploitation and abuse committed by its peacekeepers. UN leadership in a hybrid tribunal can also be grounded in the concept of "expressive value" which is used as a justification for international criminal justice generally.[34] Expressive value refers to the collective condemnation by the community of particular behaviour through prosecution of those expressing that behaviour.[35] In the peacekeeping context, I would argue that the UN's zero-tolerance policy on sexual exploitation and abuse is the particular behaviour that the UN expressly condemns.[36] Therefore, UN leadership in the investigation and prosecution of peacekeepers who engage in prohibited sexual conduct will express the strength of the international community's disapproval of this behaviour.[37] Moreover, holding peacekeepers to account through a special court with UN leadership can contribute to ending impunity and strengthening the rule of law generally via the "demonstration effect".[38] The "demonstration effect" refers to the notion that hybrid courts in particular will leave a "legacy" or a lasting impact on the rule of law of the local territory and of the international community generally.[39]

The three principles are about improving accountability from the perspective of victims, their communities, and host states; they are about legitimacy in responding to sexual exploitation and abuse, inclusivity of the host state, and great transparency to the

[34] Shany, above n 29, at 445.
[35] At 445.
[36] UN Secretary-General's Bulletin *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, SG SGB ST/SGB/2003/13 (2003); UN Conduct and Discipline Unit *We are United Nations Peacekeeping Personnel* <http://cdu.unlb.org>; UN Conduct and Discipline Unit *Ten Rules: Code of Personal Conduct for Blue Helmets* <http://cdu.unlb.org>.
[37] Burke, *Sexual Exploitation and Abuse by UN Military Contingents*, above n 13, at 239.
[38] *Rule-of-Law Tools for Post-Conflict States*, above n 14, at 4, 6 and 17ff (specifically referring to the advantages to hybrid courts); see also Dickinson, above n 28, at 394.
[39] Dickinson, above n 28, at 394.

international community. I argue that these principles are best served through a hybrid court for peacekeepers.

(4) A HYBRID COURT

Hybrid courts have been used in different contexts around the world for similar purposes; to fill an accountability gap where the affected state is unable to do so. Since past and present practice of hybrid courts exist, there are different models to draw from in order to discuss their applicability to sexual exploitation and abuse by military contingent members. Hybrid models were also suggested and discussed by the Group of Legal Experts in their 2006 report and more recently by academic Roisin Burke.[40] In this section I will briefly sketch out the historic contexts of hybrid courts in Kosovo, Sierra Leone, East Timor and Cambodia. I will then look at the commonalties between the examples of hybrid tribunals and how such models could apply in the context of peacekeeping. For the discussion below on "common factors" I will be partially structuring my critique using Sarah Williams' book *Hybrid and Internationalised Criminal Tribunals*.[41] Having closely examined previous and current practice of hybrid tribunals, Williams has suggested common features and attributes of such tribunals which are useful for discussing the possibility of a special hybrid court for peacekeepers. I will compare these attributes with the three principles underpinning this thesis (justice being seen to done, host state ownership, and UN leadership).

(A) PAST AND PRESENT EXAMPLES OF HYBRID COURTS

So-called "hybrid" tribunals are internationalised national courts.[42] These courts have been utilised as a response to mass atrocities and typically have jurisdiction over both

[40] Burke *Sexual Exploitation and Abuse by UN Military Contingents*, above n 13; Burke "UN Military Peacekeeper Complicity in Sexual Abuse", above n 13; Group of Legal Experts Report, above n 2.
[41] Above n 19.
[42] Burke *Sexual Exploitation and Abuse by UN Military Contingents*, above n 13, at 385.

international and domestic crimes.[43] They also tend to have mixed international and national personnel acting as registrars, judges, and lawyers. Hybrid tribunals have been established in Kosovo, Sierra Leone, East Timor and Cambodia with varying degrees of success.

The Regulation 64 Panels were implemented as a response to the Serbian directed ethnic cleansing of local Albanians in Kosovo.[44] In 1999 the UN Interim Administration Mission in Kosovo (UNMIK) was confronted with the mass investigation, detention and prosecution of alleged offenders.[45] The physical infrastructure of Kosovo's legal system was destroyed.[46] Only few local Albanians were legally trained.[47] Applying local law and international human rights standards, the Panels held trials against accused war criminals using mixed international and national personnel to fill the gaps in expertise.[48]

Arguably one of the more successful examples of hybrid tribunals in terms of creation and overall prosecution of international crimes is the Special Court of Sierra Leone (SCSL).[49] After a civil war that spanned a decade, Sierra Leone's fractured legal system faced the investigation and prosecution of mass atrocities, including the recruitment of child soldiers.[50] The Government of Sierra Leone negotiated an agreement with the UN

[43] At 385.
[44] *Security Council Resolution* 1244 SC Res S/Res/1244 (1999).
[45] Dickinson, above n 28, at 297.
[46] At 297.
[47] At 297.
[48] *Regulation 1999/1 On The Authority of the Interim Administration in Kosovo* UNMIK/REG/1999/1 (1999) *Regulation 1999/24 On the Law Applicable in Kosovo* UNMIK/REG/1999/24 (1999); international criminal law was applied through pre-existing domestic legislation J Cerone and C Baldwin "Explaining and Evaluating the UNMIK Court System" in C R Romano, A Nollkaemper and J K Kleffner (eds) *Internationalised Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford University Press, Oxford, 2004) 41 at 44-47.
[49] Argued by D Cohen "Hybrid Justice in East Timor, Sierra Leone and Cambodia: Lessons Learned and Prospects for the Future" (2007) 43 *Stanford Journal of International Law* 1, at 23; Mendez above n 19, at 81-82.
[50] Cohen above n 49, at 11; E Nielsen "Hybrid International Criminal Tribunals: Political Interference and Judicial Independence" (2010) 15 *UCLA Journal of International Law & Foreign Affairs* 289 at 317.

establishing a hybrid tribunal to put war criminals on trial using a mix of international and national personnel.[51]

In the wake of the vote to become independent from Indonesian rule, the Timorese were subjected to targeted killings by the Indonesian army and local militia groups.[52] The Special Panel of the Dili District Court was created to prosecute those associated with these mass atrocities.[53] The Special Panels were established as part of the UN Transitional Administration in East Timor (UNTAET).[54] In terms of structure, the Special Panels operated within the domestic legal system, with any appeals taken up by the national East Timorese Appeals Court (also with mixed international and domestic personnel).[55]

The process of forming the Extraordinary Chambers (ECCC) was initiated by the Cambodian Government in order to investigate and prosecute those involved in the Khmer Rouge regime that resulted in the deaths of 1.5 million people from 1975-1979.[56] An eight year delay between the request for a tribunal and the establishment of the ECCC was

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[51] *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, Letter dated March 6 2002 from the Secretary-General addressed to the President of the Security Council S/2002/246 (2002).

[52] Cohen, above n 49, at 7; S Linton "Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor" (2001) 25 *Melbourne University Law Review* 122; Additionally, the *Statue of the Special Court for Sierra Leone* has been the only constituent instrument of the hybrid tribunals to explicitly address criminal conduct by peacekeepers. Article 1(3) acknowledges that the TCC has primary jurisdiction over troops, however provides that where states are unwilling or unable to prosecute the SCSL may have jurisdiction. SCSL jurisdiction must be first authorised by the Security Council. This provision has never been utilised: UN Security Council, *Statute of the Special Court for Sierra Leone (2001) as established by Security Council Resolution 1315* SC Res S/Res/1315 (2000), arts 2-5; see generally, R Cryer "A special court for Sierra Leone?" (2001) 50 *International and Comparative Law Quarterly* 435 at 440-441; A McDonald "Sierra Leone's Shoestring Special Court" (2002) *84 International Review of the Red Cross* 121 at 132-133.

[53] Cohen, above n 49, at 7; Linton, above n 48, at 123ff; *Report of the International Commission of Inquiry on East Timor* S/2000/59 (2000).

[54] *Situation of Human Rights in East Timor* GA A/54/660 (1999) at [6]; *Security Council Resolution 1272* SC Res S/Res/1272 (1999).

[55] *Regulation 2000/15 On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences* UNTAET/REG/2000/15 (2000) at [Section 1].

[56] See generally C Etcheson "The Politics of Genocide Justice in Cambodia" in C P R Romano, A Nollkaemper and J K Kleffner (eds) *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press, Oxford, 2004) 181; H Horsington "The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal" (2004) 5 *Melbourne Journal of International Law* 462; B Kiernan "Historical and Political Background to the Conflict in Cambodia" in K Ambos and M Othman (eds) *New Approaches in international Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (Freiburg I Br, Berlin, 2003) 173.

partially due to many disagreements between the government and the UN and concern about possible corruption on the part of the Cambodian government.[57] The ECCC itself comprises of three Trial Chambers with mixed international and domestic personnel.[58]

The hybrid model sought to combine the best elements of international and domestic courts in order to promote transitional accountability in the aftermath of mass atrocities.[59] The hybrid model has particular conceptual benefits. Mixed international and national personnel can fill gaps in local expertise and ongoing training and professional development of local personnel promotes sustainable accountability once international experts leave.[60] International personnel can also negate perceptions of impartiality.[61] The domestic location and host state ownership of the court supports legitimacy from the point of view of the local population.[62] As noted above, the conceptual "promise" of hybrid courts potentially support the three principles of justice being seen to be done, host state ownership and UN leadership. However, the past and present examples of hybrid courts have in practice fallen short of such ideals.

The purported "success" of the hybrid courts has been limited to the number of completed prosecutions of high-ranking officials complicit in mass atrocities.[63] And while these courts

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[57] *Agreement Between the United Nations And the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea* GA Res A/Res/57/228 B (2003). See also See S Scully "Judging the Success and Failures of the Extraordinary Chambers of the Courts of Cambodia" (2011) 13 *Asian-Pacific Law & Policy Journal* 301 at 322-334; C Campbell "Cambodia's Khmer Rouge Trials are a Shocking Failure" *TIME* (13 February 2014) www.time.com.

[58] *Agreement Between the United Nations And the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea,* above n 53, art 2 (2)(a)-(b).

[59] P McAuliffe "Hybrid Courts in Retrospect: Of Lost Legacies and Modest Futures" in Y McDermott, W Schabas and N Hayes (eds) *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Taylor and Francis, London, 2013) at 445.

[60] At 455; see also Mendez, above n 19.

[61] McAuliffe, above n 59, at 455.

[62] J D Ciorcian and A Heindel *Law, Meaning and Violence: Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (University of Michigan Press, Michigan, 2014) at 70.

[63] See for example A Cassese *Report on the Special Court for Sierra Leone* (Submitted by the Independent Expert, 2006); *Summary of the Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999* S/2005/458.

"should be commended for establishing accountability as a standard of law and public policy where the alternative was systematic impunity",[64] they struggled with realising the more holistic goals. For example, many hybrid courts were unsuccessful at securing sufficient local ownership to foster legitimacy from the perspective of the community.[65] Conversely, the ECCC has been criticised for allowing too much local ownership, resulting in significant delay and political interference, negatively impacting on the perception of impartiality.[66] A focus on prosecution and conviction meant transferring a significant role to international judges and prosecutors and weakening the participation of domestic personnel.[67]

Some scholars[68] argue that the above issues with hybrid courts are related to implementation rather than their underlying ideals. Collectively, the hybrid courts lacked the required resources and training for outreach and local inclusivity.[69] Therefore, in order to avoid or mitigate similar issues with a special court for peacekeepers there would need to be sufficient resources (both financial and human). The UN could take leadership in supporting the allocation of such resources. Additionally, it is fundamental that a positive and open dialogue between the host state and the UN be utilised in order to implement host state ownership appropriately.

[64] McAuliffe, above n 59, at 458.
[65] For these criticisms see T Perriello and M Wierda *Lessons from the Deployment of International Judges and Prosecutors in Kosovo* (International Center for Transitional Justice, March 2006); C Reiger and M Wierda *The Serious Crimes Process in Timor-Leste: In Retrospect* (International Center for Transitional Justice, March 2006); P Rapoza "Hybrid Criminal Tribunals and Concept of Ownership: Who Owns the Process?" (2006) 21 *American University International Law Review* 525.
[66] Ciorcian and Heindel, above n 62, at 71.
[67] McAuliffe, above n 59, at 460.
[68] For example Dickinson, above n 28, at 307; N Jain "Conceptualising Internationalisation in Hybrid Courts" (2009) *Singapore Yearbook of International Law* at 85.
[69] Cohen, above n 49, at 14; McAuliffe, above n 59, at 463.

(B) COMMON FACTORS: APPLICABLE TO MILITARY PEACEKEEPING PERSONNEL

In Sarah William's book *Hybrid and International Criminal Tribunals* a number of factors were identified as the driving force behind the establishment of a hybrid court.[70] These factors included the need to ensure accountability where crimes are of concern to the international community, to preserve state sovereignty to support the national legal system, to avoid immunities to domestic prosecution, and to "ensure that trials meet international fair trial standards".[71] Arguably, these factors can be applied in the context of sexual exploitation and abuse by military forces and can also align closely with the three conceptual principles of justice being seen to be done, host state ownership and UN leadership.

(I) SEXUAL EXPLOITATION AND ABUSE BY PEACEKEEPERS IS OF INTERNATIONAL CONCERN

One of the common aspects of hybrid tribunals to date is that they focus on international crimes.[72] Hybrid tribunals have been established in the wake of armed conflict where mass atrocities have been committed and may be ongoing.[73] This may be accompanied by a complete breakdown of the judicial system and infrastructure.[74] Both the context and the crimes committed are generally of "international concern"; for example, crimes against humanity, genocide, and war crimes. Sarah Williams has argued that the inclusion of at least one international crime is a necessary attribute of any hybrid court.[75] Moreover, Williams

[70] Williams, above n 19.
[71] At 196.
[72] For crimes within material jurisdiction of the various hybrid courts see *regulation 1999/1*, above n 48 and *Regulation 1999/24*, above n 48 [Kosovo Panels]; *Statute of the Special Court for Sierra Leone*, above n 52, arts 2-4 [Sierra Leone]; *Regulation 2000/15*, above n 55, at [1.3] [East Timor]; *Agreement Between the United Nations And the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*, above n 53, art 9 [ECCC].
[73] Williams, above n 19, at 196; Cassese, above n 25, at 10.
[74] Such as was the case with East Timor: Mendez, above n 19, at 82.
[75] Williams, above n 19, at 248.

argues that in order to intervene in the affected state's sovereignty via the establishment of a hybrid court, it needs to be justified by including crime/s of "international concern".[76]

As discussed previously in this thesis, although it may be possible that acts of sexual exploitation and abuse could fulfil the rigid requirements of these international crimes, they are unlikely to do so.[77] However, sexual exploitation and abuse by military contingent members ought to be of international concern simply because UN peacekeepers represent the international community. The presence of a multi-national peacekeeping operation should be enough for the required international dimension. Moreover, as established in Chapter Two, sexual exploitation can be generally considered violence against women under international human rights law, which is also then a matter of "international concern".[78] Peacekeepers deployed into post-conflict areas are there to protect the local people and not abuse them in the process. Such abuses should be of international concern. Therefore, the absence of an "international crime" strictly defined should not preclude a hybrid court for the special purpose of prosecuting military contingent members. Additionally, the Group of Legal Experts in 2006 noted specifically that a hybrid court need not include international crimes.[79]

(II) A TRIBUNAL FOR PEACEKEEPERS WOULD SUPPORT (HOST) STATE SOVEREIGNTY AND THE NATIONAL LEGAL SYSTEM.

As argued previously, there is preference among scholars to keep accountability for crimes within the host state's legal system; one of the reasons is that it would bolster the sovereignty of the host state.[80] It is important for the victim and their community to see justice being

[76] At 248.
[77] See Chapter Seven: The International Criminal Court.
[78] See Chapter Two: What is Sexual Abuse and Sexual Exploitation?
[79] Group of Legal Experts Report, above n 2, at [34].
[80] Williams, above n 19, at 59.

done and this is achieved better when prosecution takes place in the host state. This would also provide transparency of the accountability process for the international community. The advantage of a hybrid court in the host state is that the victim's community would have some ownership over the process of justice against perpetrators.[81] Justice is "seen to be done". The addition of international personnel may also benefit the local community's perception of the tribunal's legitimacy, especially where the national legal system has suffered from corruption or partiality.[82] However, there can be legitimate criticism where international personnel have more influence over the legal system as it can hark back to imperialism.[83] Consultation with the local community could be important here. Therefore, a balance must be struck between international and domestic personnel.

In many host states, domestic capacity building is one of the key aspects of a peacekeeping mission.[84] Implementation of institutions that bolster local capacity will therefore be an advantage to the national legal system of the host state. Moreover, a court for peacekeepers that takes on a mixed or hybrid model will likely avoid TCC fears that nationals will be subjected to unfair trials by a host state alone without civil rights safeguards.

It should be noted that the more successful hybrid tribunals had clear mandates in terms of duration, structure and ownership. For instance, in Sierra Leone the Special Courts were administered by local personnel appointed by the UN.[85] A strong registrar (mutually agreed

[81] Dickinson, above n 28, at 306.
[82] At 306; Mendez, above n 19, at 70.
[83] Dickinson, above n 28, at 306; in Sierra Leone a common criticism of the Special Courts was that they were "western courts" removed from the domestic system and ruled by the international community, see Mendez, above n 19, at 79.
[84] See for example, *Security Council Resolution 2149* SC Res S/Res/2149 (2014) [MINUSCA]; *Security Council Resolution 1927* SC Res S/Res/1927 (2010) [MINUSTAH]; *Letter Dated 5 June 2007 from the Secretary-General to the President of the Security Council* S/2007/307/Rev.1 (2007) [UNAMID]; *Statement by the President of the Security Council* SC Prest S/Prest/2006/38 (2006) [UNMIL]; *Security Council Resolution 1996* SC Res S/Res/1996 (2011) [UNMISS]; *Security Council Resolution 2226* SC Res S/Res/2226 (2015) [UNOCI].
[85] Cohen, above n 49, at 12-13; Mendez, above n 19, at 81-82.

between the UN and the Government) meant few problems with day-to-day direction.[86] This can be compared to East Timor where success of the Special Panels was hindered by arguments between the UN and the Government regarding ownership.[87] This included long delays, for example, due to misunderstandings about who was to pay for electricity supplied to the court itself.[88] There were also disagreements as to appointments of judges that delayed court processes for well over a year.[89] These problems were partly attributed to the lack of negotiation between the East Timorese and the UN; as the Special Panels were created under UN regulations, the focus of decision-making concerned UN priorities rather than those of the affected community.[90] Therefore, the creation of a hybrid tribunal for the special purpose of prosecuting military contingent members would likely benefit from negotiations between affected states.

A dialogue between member states and the UN would be a necessary first step. However, in the case of the Extraordinary Chambers in Cambodia, the dialogue between the UN and the state government caused years of delay. On the one hand, the Cambodian government was reluctant to give up full ownership of the process (including a majority of local personnel); on the other, the Secretary-General had serious concerns about Cambodian partiality and fairness in the local legal system.[91] The functioning of the ECCC has been hindered by continued political interference.[92] In such cases where there is the likelihood of political corruption or undue political interference from the host state government, the principle of host state ownership would have to give way to the other two principles, particularly UN leadership. For example, the UN might implement a majority of international personnel or

[86] Cohen, above n 49, at 12-13.
[87] At 9.
[88] At 9-10.
[89] At 10.
[90] Williams, above n 19, at 191.
[91] S Nouwen "'Hybrid Courts': The Hybrid Category of a New Type of International Crimes Court" *Utrecht Law Review* (research paper, University of Cambridge Faculty of Law, 2011) 190 at 194.
[92] Scully, above n 57, at 322-334; Campbell, above n 57.

appoint an independent registrar. Nevertheless, in order to incorporate host state ownership (where plausible) such dialogue between states and the UN about a tribunal could be a lengthy process.

(III) A TRIBUNAL FOR PEACEKEEPERS WOULD AVOID LEGAL IMMUNITIES AND FILL THE ACCOUNTABILITY GAP

A hybrid court for peacekeepers may mitigate the current gap in accountability where the troop-contributing country does not prosecute. Where hybrid tribunals have been suggested to solve the accountability problem in sexual exploitation and abuse by peacekeepers, it has been argued that troop-contributing countries should retain exclusive criminal jurisdiction over their troops.[93] However, the Group of Legal Experts in 2006 argued that hybrid tribunals could be used to "facilitate host state jurisdiction", suggesting that the host state would have primary jurisdiction.[94] Nevertheless, the Group in that report were concerned only with jurisdiction over categories of personnel falling outside military contingent members, favouring exclusive criminal jurisdiction of the TCC.[95] In the peacekeeping context there is an added layer of complexity that the pre-existing examples of hybrid tribunals do not need to consider. In Kosovo, Sierra Leone, East Timor, and Cambodia the issue of jurisdiction was less ambiguous as crimes were committed within the territory of that state, by nationals or members of the previous governing body. In the peacekeeping context, there are two states which can legitimately claim jurisdiction over conduct committed by military members; the host state and the troop-contributing country. The sovereignty of two states needs to be balanced. It is due to this added level of complexity that Roisin Burke has argued for an alternate version of the current hybrid tribunal model

[93] Burke *Sexual Exploitation and Abuse by UN Military Contingents,* above n 13, at 232; Zeid Report, above n 1, at [33].
[94] Group of Legal Experts, above n 2, at [33].
[95] At [7].

(discussed below), which differs from the Group of Legal Experts' recommendation above as Burke favours retention of TCC exclusive criminal jurisdiction.[96]

(IV) A TRIBUNAL FOR PEACEKEEPERS WOULD ENSURE FAIR TRIAL STANDARDS

Past and present examples of hybrid tribunals have ensured fair trial standards and human rights protections.[97] There is no reason to assume that the same could not be incorporated into a special court for peacekeepers. Such standards could be ensured and facilitated by the United Nations taking into account human rights norms related to criminal trials, such as the *International Covenant on Civil and Political Rights*.[98]

(5) TRI-HYBRID TRIBUNAL

In this section I will explore the "tri-hybrid" tribunal system put forward by Roisin Burke.[99] Using similar justifications explored above for the establishment of hybrid courts (increasing legitimacy of decision in the host state, local capacity building, and expressive value of normative decisions), Burke expands on current models and puts forward a tribunal based on the cooperation of the troop-contributing state, host state, and the UN.

Under general jurisdictional principles in international law the criminal conduct of peacekeepers can give rise to both territorial jurisdiction (host state) and jurisdiction based on active personality (TCC). According to Burke, this "dual jurisdiction" should be expressly acknowledged in the creation of a new tribunal.[100] Therefore, jurisdiction should

[96] Burke *Sexual Exploitation and Abuse by UN Military Contingents,* above n 13, at 245.
[97] See for example *Regulation 1999/1,* above n 48 and *Regulation 1999/24,* above n 48 [Kosovo]; *Statute of the Special Court for Sierra Leone*, above n art 52 [Sierra Leone]; *Agreement Between the United Nations And the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*, above n 57, art 13 [ECCC].
[98] *International Covenant on Civil and Political Rights* 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).
[99] Burke *Sexual Exploitation and Abuse by UN Military Contingents,* above n 13, at 245-251.
[100] Burke "UN Military Peacekeeper Complicity in Sexual Abuse", above n 13, at 394.

be apportioned between the host state and the TCC.[101] This follows a similar line of argument taken by the Group of Legal Experts in 2006, where it was suggested that host state jurisdiction should be favoured in any alternative system of prosecution.[102] However, the Group were not considering military personnel, favouring the exclusive jurisdiction of the troop-contributing country. A tri-hybrid model may be a way to reconcile or balance the two perspectives (between host state jurisdiction and TCC exclusive jurisdiction) and potentially solve the conflicting jurisdiction problem presented by a hybrid model.

Nevertheless, it should be noted that at the heart of Burke's alternative court structure is the retention of TCC exclusive criminal jurisdiction.[103] Thus, a proposed new tribunal for peacekeepers would exercise secondary jurisdiction in the event that the TCC is unable and unwilling to take action (similar to the situation of complementarity under the International Criminal Court).[104] Under Burke's new hybrid system the TCC would also hold partial jurisdiction over their national members (although the author does not go on to explain what is meant by "partial jurisdiction").[105]

Burke explores a system where the split of jurisdictional components between the TCC and host state would need to be agreed between the UN and member states.[106] Moreover, the precise split of jurisdiction may depend on each mission and particular host state. For example, while one host state may have the infrastructure in place to have jurisdiction over the investigation, prosecution and sentencing, another host state may not (due to conflict, natural disaster or diaspora).[107] An agreement as to the split of jurisdiction would need to be

[101] At 394.
[102] Group of Legal Experts Report, above n 2, at [27].
[103] Burke *Sexual Exploitation and Abuse by UN Military Contingents*, above n 13, at 232.
[104] At 232; *Rome Statute of the International Criminal Court* 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002) [Rome Statute] at art 17.
[105] Burke *Sexual Exploitation and Abuse by UN Military Contingents*, above n 13, at 232.
[106] At 246.
[107] At 246.

negotiated between the parties, including the UN as the administrator of the particular peacekeeping mission's mandate. Due to its binding nature, a treaty would be an applicable instrument in which to have such an agreement; perhaps through the pre-existing agreements such as the Status-of-Forces agreement (between the UN and the host state) and the Memorandum of Understating (between the UN and the TCC).[108] However, this process could prove long and tedious if there are disagreements between the host states and TCCs demands in terms of jurisdiction over troops. Also, in separate agreements it may be difficult to reconcile the demands of the host state versus those of the TCC. To avoid this potential problem, it could be possible to negotiate a multilateral treaty or utilise a Security Council resolution and this would also avoid the need for consent of the host state or the TCC.

As with existing hybrid courts, Burke's tri-hybrid model envisions mixed international and domestic personnel where necessary, including administrators, lawyers and judges.[109] Moreover a "central feature" would include a roster of skilled personnel to draw from and be on standby in order to deploy when needed.[110] Again, taking the Group of Legal Experts' 2006 report into consideration, the host state would be given priority under this model in terms of personnel.[111] As host state personnel are likely to understand local laws and custom, language and the situation on the ground, this knowledge should be utilised, especially in the investigation stage.[112]

[108] 2007 MOU, above n 20; *Model Status of Forces Agreement between the United Nations and Host Countries* GA A/45/594 (1990) [Model-SOFA] art 47(b).
[109] Burke *Sexual Exploitation and Abuse by UN Military Contingents,* above n 13, at 247.
[110] At 246-247.
[111] Group of Legal Experts Report, above n 2, at [33].
[112] Burke *Sexual Exploitation and Abuse by UN Military Contingents,* above n 13, at 247; Mendez, above n 19, at 70.

(6) Discussion of Proposed Models: A Hybrid Solution?

Having explored the concepts of hybrid and tri-hybrid tribunals and how they might apply in the peacekeeping context, in this section I will further explore a special court for peacekeepers and what structure it might have. Moreover, I will discuss three potential hurdles in establishing such a tribunal; the material jurisdiction (criminalised conduct within sexual exploitation and abuse), the political will of states (and how states might sign up to such a tribunal), and resourcing the tribunal.

As discussed above, under Burke's tri-hybrid model the troop-contributing state still has a major role. Justification for the retention of exclusive criminal jurisdiction by the contributing states has been "sovereign prerogative."[113] This is the notion that the criminal investigation and prosecution of military members are a special part of a state's exercise of sovereignty and an integral feature of the command and control structures of their particular forces.[114] The fear associated with removing the exclusive jurisdiction of TCCs is the decline of contributed troops from states.[115] The UN may fail to draw enough personnel from states if there was a possibility that another state or institution would investigate and prosecute their military members.

The fear that states might not contribute their troops if their personnel would be subject to the jurisdiction of another judicial institution has never been tested. Moreover, member states who contribute troops receive funding from the UN; for the top contributing states (many of which are developing states) peacekeeping can generate a substantial amount of

[113] Burke *Sexual Exploitation and Abuse by UN Military Contingents,* above n 13, at 245; also see Zeid Report, above n 1, at [33].
[114] Burke *Sexual Exploitation and Abuse by UN Military Contingents,* above n 13, at 245; Zeid Report, above n 1, at [33].
[115] Burke *Sexual Exploitation and Abuse by UN Military Contingents,* above n 13, at 245; Zeid Report, above n 1, at [33].

funding for their local economies.[116] The question is whether such states would likely forgo monetary benefits if the exclusive jurisdiction were removed? Additionally, if the international community must accept that in order for troops to be contributed by states then it must also be accepted that some (predominately, if not exclusively, male)[117] peacekeepers will commit sexual exploitation and abuse (against primarily female victims) with impunity, then I argue that the structure of peacekeeping operations that allows this behaviour unabated must be seriously reviewed.[118] For the UN, to expect the international community to except such behaviour from peacekeepers would not only reinforce a culture of sexual exploitation and abuse, but would implicitly support the oppression of women. It has been established earlier in this thesis that sexual exploitation and abuse represent human rights abuses and, when committed by peacekeepers, this is of international concern. The international community should be able to expect that states will continue to contribute troops even if personnel are held accountable by an independent judicial institution.

I argue that the exclusive jurisdiction to the TCC must be changed; I submit that an alternative tribunal or special court which envisions the retention of exclusive criminal jurisdiction to troop-contributing countries would be unlikely to materially change the current lack of accountability for sexual exploitation and abuse committed by military personnel. If the TCC needs to have been deemed "unwilling" or "unable" to exercise jurisdiction themselves in order for a hybrid court to have jurisdiction then this is similar to the requirements under the Rome Statute for the exercise of jurisdiction by the International

[116] See for example, K Krishnasamy "Pakistan's Peacekeeping Experiences" (2002) 9 *International Peacekeeping* 103 at 111-113; see also United Nations Peacekeeping "Financing Peacekeeping" (August 2015) <https://www.un.org>.

[117] Conduct and Discipline reporting of sexual exploitation and abuse allegations does not include the gender of perpetrators, however, a large majority of peacekeeping personnel are male see United Nations Peacekeeping "Gender Statistics by Mission" (December 2015) <www.un.org>.

[118] Also argued by an NGO (AIDS-Free World) which sought to challenge the impunity of peacekeepers who commit sexual exploitation and abuse see S Ghosh "Are UN Peacekeepers doing more harm than good?" *Aljazeera* (15 August 2015) www.aljazeera.com.

Criminal Court (ICC).[119] In Chapter Seven I noted that this was a negative attribute of the ICC. Although it could be argued that the possibility of another tribunal having jurisdiction over their troops may encourage more states to take steps in investigating and prosecuting sexual exploitation and abuse cases, the time delay between the decision or failure to exercise jurisdiction and the conclusion that the state is indeed "unable or unwilling" may drastically hinder subsequent efforts to ensure accountability.[120] In criminal cases involving sexual conduct the timeliness of the investigation component is essential to proving an offence in prosecution, particular in regard to collective medical evidence.[121] Issues relating to undue delay have been recognised in the 2007 Model-Memorandum of Understanding which provides that where a TCC has not notified the UN of their intention to investigate within 10 working days, then the UN will initiate their own administrative investigation in order preserve evidence.[122] Thus, for a court to have secondary jurisdiction or be of "last resort" may not solve the accountability problem.

The exclusive jurisdiction of troop-contributing countries should be restricted to "functional immunity". This would allow military contingent members to be immune from host state legal action (or the jurisdiction of another judicial institution) involving conduct performed within their official capacity and would align with immunity granted to other categories of peacekeeping personnel.[123] Acts within "official capacity" could never include serious misconduct, such as sexual exploitation and abuse.

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[119] Rome Statute, art 17.
[120] For the point that exercise of jurisdiction by another court may encourage domestic prosecution see generally Shany, above n 29.
[121] See generally, J Morse "Documenting Mass Rape: Medical Evidence Collection Techniques as Humanitarian Technology" (2014) 8 *Genocide Studies and Prevention: An International Journal* 63.
[122] 2007 MOU, art 7 *quater* 3(a); see also Secretary-General *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* GA A/69/779 (2015) at [92]; Report of the Secretary-General *The Future of the United Nations Peace Operations: Implementation of the Recommendation of the High-Level Independent Panel on Peace Operations* GA A/70/375-S/2015/628 (2015) at [119].
[123] See Model SOFA, art 46.

Taking the above ideas and reimagining them as a court of first instance, I will discuss the possible structure and jurisdiction of an alternative court model for prosecuting military contingent members for sexual exploitation and abuse.

(A) STRUCTURE

One of the "lessons learned" from previous practice of hybrid tribunals is that an agreement between the affected state and the UN was a major advantage to their overall success.[124] In the example of the hybrid tribunal in Kosovo, the local Albanian Kosovars viewed the Panels with scepticism and the lack of confidence in the domestic legal system is likely to have stemmed from the lack of consultation with the affected communities.[125] This can be compared with the process in Sierra Leone, where the government initiated negotiation for a tribunal with the UN; there was also the added advantage of having an outreach program so that the local communities had a stronger connection to the Special Court itself.[126]

The difficulty with peacekeeping missions is that each one is different in terms of its mandate and the context of the community in which they are deployed. Each host state may have different needs in terms of justice mechanisms and thus may have different levels of involvement in a court for peacekeepers. Depending on the mission, a bilateral treaty with the host state for the purpose of establishing a tribunal may not be possible; for example, it may not be clear whether there is a sovereign government with which to make such an agreement.[127] For inclusivity, consultation with local communities is an appropriate first step.[128] An outreach program to raise awareness of such a court and connect its work with

[124] Cohen, above n 49, at 23;
[125] Mendez, above n 19, at 76-77.
[126] At 79-80; T Perriello and M Wierda *The Special Court for Sierra Leone Under Scrutiny* (International Center for Transitional Justice, 2006) available online <www.umn.edu> at 35-37.
[127] For example, in both East Timor and Kosovo these states did not have "sovereign powers". Thus, the UN had to take a major role in establishing the hybrid tribunals without full consultation with affected communities. Nouwen, above n 91, at 199; Mendez, above n 19, at 82-83.
[128] Saul, above n 22, at 433.

the affected communities will be necessary to achieve an adequate level of host state ownership and "justice being seen to be done" for the victims and the communities. As stated above, such agreements may be made bilaterally between each host state, perhaps by amending the current model-Status-of-Forces Agreement; and specifics may then be tailored through negotiations.[129] The structure agreed to must be reflected in the corresponding MOUs between the UN and TCCs involved. Alternatively, there could be a general multilateral treaty determining major aspects of such a tribunal, for example, stating that the court is one of first instance, on-site, and detailing the material jurisdiction (see below); thus, leaving details relating to host state ownership to be negotiated within the SOFAs and MOUs.

Although Burke mentions in passing that the UN should have some role in a tri-hybrid tribunal, she does not elaborate.[130] Taking the example of the more successful hybrid tribunals (in terms of day-to-day running of the court, and host state ownership), such as the Special Court of Sierra Leone, I would suggest that the UN should have a significant role in administration and facilitation, for instance through a centralised registrar. This would ensure the principle of UN leadership. A centralised UN administrative body could be partially influenced by the 2009 Stimson Center Report's recommendation for a Judicial Support Division.[131] In addition to providing central administration for the hybrid court(s), such a body could assess the host state's judicial system and available expertise and provide logical support and assistance accordingly. To encourage inclusivity, the appointed

[129] Model SOFA, art 100.
[130] Beyond that existing UN organs, such as the OIOS might be able to bolster the investigative process of a new court, see Burke *Sexual Exploitation and Abuse by UN Military Contingents*, above n 13, at 245 and 247.
[131] See W J Durch, K N Andrews, M L England and M C Weed *Improving Criminal Accountability in United Nations Peace Operations* (STIMSON Center Report, Washington, 2009) at xiv-xv.

individual(s) may be mutually agreed between TCCs and host states or at least such interested parties should be consulted.

Because the purpose of a special tribunal is to prosecute international personnel, it may be appropriate that the tribunal operates separately from the host state's national courts.[132] Additionally, this may be even more appropriate where domestic legal institutions have suffered from conflict or natural disaster (for example, where physical infrastructure is destroyed or local personnel are missing).[133]

Again, Sarah Williams' work on *Hybrid and Internationalised Criminal Tribunals* is useful here in terms of the possible structure or features of such a court for peacekeepers.[134] Based on the author's examination of practice, Williams contends that there are six defining features of a hybrid tribunal; first, that the tribunal should have a criminal function. The purpose of a hybrid court for military contingent members would be to hold individuals to account for crimes of a sexual nature (presumably other crimes as well, such as homicide).[135] Williams suggests the second structural element of hybrid courts is that they are temporary or transitional in nature. As the purpose of the tribunal would be to prosecute military personnel, the temporal jurisdiction of the tribunal would last as long as the peacekeeping mission itself. Therefore, the tribunal would be temporary (although, it may be long-term depending on the length of the mission).

Williams' third defining feature is that tribunals should have a mix of international and domestic personnel. The element of mixed personnel aligns with a policy of inclusivity and supports legitimacy within the principle of host state ownership. Mixed personnel would

[132] For example, the Special Court of Sierra Leone operated outside from the domestic court system Nouwen, above n 91, at 202.
[133] As was the case in East Timor where there was widespread destruction of legal and political infrastructure see Mendez, above n 19, at 84.
[134] The following discussion is based off of Williams' "defining features" above n 19, at 249.
[135] Material jurisdiction is discussed below.

need to have a certain level of expertise and sensitivity, particularly in cases involving sexual offences. Some TCCs may lack such expertise or sensitivity, and this gap may be filled by experts from other TCCs or by additional training, perhaps provided by the UN. A lack of expertise may lead to a prejudiced system and a subversion of the rule of law. A potential issue that may arise in the context of mixed personnel is a conflict between legal values for example, between a prosecutor from a civil law background and another from a common law background.[136] Cooperation between domestic and international personnel will have to be reflected in the model of the trial system, which may mean striking a balance between adversarial and inquisitorial models. Where the balance is struck may depend on the particular host state involved.

There are already mixed personnel structures in place within the UN for responding to sexual exploitation and abuse by peacekeepers. The Office of Internal Oversight Service (OIOS) is the investigative arm of the UN and is often made up of mixed personnel.[137] Moreover, for the investigation of crimes alleged to have been committed by military contingent members, investigative teams are led by the TCC national investigative officer.[138] These structures could be utilised under Burke's tri-hybrid model to include a host state personnel presence if necessary (discussed further below).

For the fourth feature, Williams has suggested that there should be international assistance in resourcing the tribunal. As the United Nations receives financial contributions from its member states it follows that a tribunal led by the UN for the prosecution of peacekeeping troops would be resourced from international sources.[139] I will explore resourcing a hybrid

[136] Cassese, above n 25, at 7.
[137] See generally 2007 MOU, art 7 *quater*. The UN has indicated replacing the OIOS investigative teams with "Immediate Response Teams", these are assumed to still be made up of international personnel see UN Conduct and Discipline Unit "Fact Sheet on Sexual Exploitation and Abuse" (3 September 2015) <http://cdu.unlb.org>.
[138] 2007 MOU, art 7 *quater.*
[139] See generally *Implementation of General Assembly Resolutions* GA A/67/224/Add.1 (2012) Annex.

tribunal for peacekeeping below. The fifth structural feature is that listed crimes within the jurisdiction of the tribunal should be a mix of international and ordinary national crimes. As already noted above, I have argued that the inclusion of international crimes is not necessarily a requirement or a pre-requisite feature of a hybrid tribunal; nevertheless, sexual exploitation and abuse by peacekeepers can be regarded as of international concern.[140] Williams' final purported attribute is that hybrid tribunals should involve the participation of more than the affected state. A court for peacekeepers would involve the host state, TCCs and the UN.

The following discussion breaks down jurisdictional aspects of a possible tribunal for military contingent members, including the split of investigation/prosecution/sentencing.

(B) JURISDICTION

Burke has suggested that jurisdiction should be apportioned between the host state, the TCC and the UN.[141] The precise split of components (investigation, prosecution, and sentencing) may be something to be worked out in negotiations in the bilateral agreements. However, it may be possible for the current system regarding investigation and prosecution to be modified to accommodate mixed personnel. Currently, where necessary, the UN through the Office of Internal Oversight Services, will cooperate with national investigation officers' sent by the TCC on any investigations into serious misconduct (this includes acts of sexual exploitation and abuse).[142]

Cooperation is currently in the form of administrative evidence gathering and sharing of information, obtaining consent from the host state's authorities where appropriate, and other

[140] A more detailed discussion on crimes that should be within jurisdiction follows below.
[141] Burke "UN Military Peacekeeper Complicity in Sexual Abuse", above n 13, at 394.
[142] 2007 MOU, art 7 *quater* 4(a)-(g).

logistical assistance.[143] This method of joint investigation is a reflection of the Zeid report's recommendation; "the participation of troop-contributing country at an expert level [in the United Nations investigation] would help to ensure that evidence was gathered in conformity with the laws of the troop-contributing country so it could be subsequently used by the country to take action against the contingent member."[144] However the procedure of cooperative investigation of serious misconduct committed by military contingents has come under some scrutiny.

Under the Model-Memorandum of Understanding (between the TCC and the UN) there is a required procedure of the conduct of investigations of serious misconduct by military contingent members (includes sexual exploitation and abuse). This procedure includes a time limit on the troop-contributing countries to initiate an investigation of allegations (10 days), and the ability of the UN (through the Office of Internal Oversight Services and mission Conduct and Discipline Teams) to conduct administrative fact-finding investigations if the time limit expires or the TCC is otherwise unresponsive.[145] Nevertheless, UN investigations must also attempt to include a representative from the national contingent investigation team (if available).[146] Although a seemingly delineated process, examining OIOS reports reveal that this process is not always followed.[147]

The Office of Internal Oversight Services has noted that in the majority of cases (of sexual exploitation and abuse) involving military contingents, TCCs have not complied with the 10

[143] At art 7 *quater* 4(d).
[144] *Revised draft Model Memorandum of Understanding between the United Nations and [Participating State] contributing resources to [the United Nations Peacekeeping Operation]* GA A/61/494 (2006) at 9; Zeid Report, above n 1, at [33].
[145] 2007 MOU, art 7 *quater* 12.
[146] At art 7 *quater* 12-13.
[147] See for example, Office of Internal Oversight Services *Evaluation Report: Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations* (May 2015) at [22]-[25].

day deadline of responding to an allegation.[148] In fact, some TCCs were scrutinised in the OIOS 2015 report for causing long delays.[149] Moreover, the OIOS has noted the varied standards of investigation between TCCs leading to disagreements about factual information regarding cases.[150] However, the OIOS and mission Conduct and Discipline Teams do not have the capacity to undertake criminal investigations and so are open for criticism about standards of investigation (for example, administrative investigations do not involve obtaining medical evidence, whereas criminal investigations do).[151] Therefore, standards are different across TCCs and the UN investigative organs. Overall, the OIOS noted a call to redraft the procedures in the MOU.[152]

Taking into consideration the above issues with the current procedure of cooperation in investigation, it would be necessary for the UN to fill the gap in investigation standards and streamline the cooperative aspect more clearly under the MOU. Nevertheless, as the tribunal I am suggesting is a court of first instance led and (at least partially) administered by the UN, then it would be necessary for the UN to negotiate an agreed standard of investigation and prosecution with its member states. Moreover, the investigative arm of the UN should be trained and equipped with the capacity to undertake criminal investigation (according to such agreed standardised methods of investigation).

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[148] At [22].
[149] At [30]-[31].
[150] See Report of the Office of Internal Oversight Services *Activities of the Office of Internal Oversight Services on Peacekeeping Operations for the period 1 January to 31 December 2012* GA A/67/297 (Part II) (2013) at [58]-[59]: Case 0405/11 involved the alleged sexual abuse of a casual UN employee by a national contingent member in the Democratic Republic of Congo. The TCC informed the UN that the complainant withdrew her allegation, whereas the OIOS disagreed with this factual information requesting investigation regardless. No further response was received from the TCC; see also at Report of the Office of Internal Oversight Services *Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations* GA A/65/271 (Part II) (2011) at [47].
[151] T A Shockley "The Investigation Procedures of the United Nations Office of Internal Oversight Services and the Rights of the United Nations Staff Member: An Analysis of the United Nations Judicial Tribunals' Judgments on Disciplinary Cases in the United Nations" (2015) 27 *Pace International Law Review* 468 at 482.
[152] *Evaluation Report,* above n 147, at [25] and [29].

Although the procedure in the MOU for cooperative investigation has been criticised, in some cases cooperation has been successful. In 2012, an allegation of sexual abuse was made against the Pakistani Formed Police Unit in Haiti.[153] In response the OIOS investigative team cooperated with the Department of Peacekeeping Operations (Police Division) and the Haitian National Police to conduct an investigation.[154] The cooperative element of the investigation saved time and a preliminary report was made to the contributing country within two weeks.[155] Therefore, a similar cooperative element could be used to incorporate mixed personnel international and national personnel for the purposes of investigation for a hybrid tribunal for peacekeepers. Such personnel may also be drawn from a roster of expertise, so as to avoid delay in initiating investigations.

On other matters of jurisdiction; it would make sense that the tribunal would remain only as long as the particular mission, and therefore be temporary. However, this would mean that allegations of sexual exploitation and abuse that are reported after the mission ends may not be investigated or adjudicated. Additionally, the crimes within its jurisdiction would have to be committed within the territory of the host state. Moreover, although military contingent members are the focus of this thesis, it would be appropriate that all peacekeeping personnel would be within the personal jurisdiction of the tribunal.

(C) Three Potential Hurdles

Having explored what a special court for peacekeepers might look like and the jurisdiction of such a court, I will now turn to three particular issues; material jurisdiction (sexual

[153] At 18.
[154] At 18.
[155] At 19.

exploitation and abuse as criminalised conduct), political will (how states may sign up to a court), and resourcing the court.

(I) MATERIAL JURISDICTION – CRIMINALISED CONDUCT

In 2006, the UN-appointed Group of Legal Experts noted that sexual exploitation and abuse by peacekeepers falls "between an ordinary criminal offence and an international crime".[156] In a later report the Group reemphasised this point, adding that peacekeepers are in a position of trust and they represent the international community; how they interact with locals will contribute to the reputation of the United Nations.[157] United Nations peacekeepers represent the international community and any serious misconduct committed by personnel is of international concern, particularly those involving the local population as alleged victims. As such, I argue that at least some forms of sexual exploitation and abuse should be included as "crimes" within jurisdiction of a special tribunal for peacekeepers.

Forms of sexual exploitation and abuse are included in the *Draft Convention on the Criminal Accountability of the United Nations Officials and Experts on Mission* (still under consideration by member states).[158] The Draft Convention was suggested by the Group of Legal Experts as a long term solution to the "accountability gap" but is aimed purely at categories of peacekeeping personnel falling outside military contingents.[159] However, the crimes currently listed are useful for determining the forms of sexual exploitation and abuse that UN officials have deemed to be worthy of criminalising in a proposed multilateral treaty.

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[156]Group of Legal Experts Report, above n 2, at [58].
[157] *Report of the Group of Legal Experts on Criminal Accountability of United Nations Officials and Experts on Mission* GA A/62/329 (2007) [Criminal Accountability Report] at [32].
[158] *Draft Convention on the Criminal Accountability of the United Nations Officials and Experts on Mission* GA A/60/980 Annex III (2007): [Draft Convention].
[159] Criminal Accountability Report, above n 157, at [70].

There are currently two options proposed for the material jurisdiction of the Draft Convention. The first option is art 3(2) which provides:

> The serious crimes referred to in paragraph 1 of the present article are, for each state party establishing and exercising jurisdiction pursuant to this Convention those which, under the national law of that State party correspond to:
>
> …
>
> (c) Rape and acts of sexual violence;
>
> (d) Sexual offences involving children;

It would seem that forms of sexual abuse have been included in the list of crimes, but not those relating to sexual exploitation. As argued in earlier in this thesis, "sexual abuse" under the current codes of conduct and the Secretary-General's *Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abu*se (S-G Bulletin)[160] covers the following conduct; rape, sexual violence and sex with minors. What is missing are forms relating to "sexual exploitation"; particularly survival sex.

The alternative art 3(2) of the Draft Convention is potentially broader:

> The serious crimes referred to in paragraph 1 of the present article, for each State party establishing or exercising jurisdiction pursuant to this Convention, are:
>
> (a) Crimes of intentional violence against the person and sexual offences punishable under the national law of that State party by imprisonment or other

[160] Above n 36.

deprivation of liberty for a maximum period of at least [one/two] year(s), or by a more severe penalty.

The reference to "sexual offences" in this alternate article has the potential to encompass many forms of sexual exploitation and abuse.[161] However, it is entirely reliant on the national laws of member states and does not seek to proscribe offences to be criminalised under domestic criminal law. It is less likely that forms of sexual exploitation would be included among member states' criminal law, particularly survival sex (close to the notion of transactional sex).

Both proposed articles of the Draft Convention seem to indicate that forms of sexual abuse committed by peacekeeping personnel are important enough to be described as "crimes" in a multilateral treaty. During the ongoing discussions between member states it seems that the inclusion of crimes of a "serious nature" has been generally supported.[162] For the most part though, state representatives have not endeavoured to differentiate the "serious" crimes from "non-serious" crimes when talking about sexual exploitation and abuse.[163] Additionally, academic Roisin Burke argues that a tri-hybrid or hybrid tribunal should only have jurisdiction over "serious incidents of [sexual exploitation and abuse]".[164] However, Burke does not elaborate what forms of sexual exploitation and abuse she would consider "serious incidents".

[161] For critique see M O'Brien "Issues of the Draft Convention on the Criminal Accountability of United Nations Officials and Experts on Mission" in N Quenivet and S Shah-Davis (eds) *International Law and Armed Conflict: Challenges in the 21st Century* (YMC Asser Press, The Hague, 2010).
[162] General Assembly *Summary record of the 5th Meeting* GA A/C.6/63/SR.6 (2008) examples at [19], [35], and [36]; General Assembly *Summary record of the 9th Meeting* GA A/C.6/66/SR.9 (2011) examples at [10], [18], [24] and [43];
[163] *Summary record of the 5th Meeting*, above n 162, examples at [12] and [38]; *Summary record of the 9th Meeting*, above n 162, examples at [34], [44], and [50].
[164] Burke *Sexual Exploitation and Abuse by UN Military Contingents*, above n 13, at 243.

I argue that sexual exploitation (as survival sex) and sexual abuse committed by peacekeepers are international crimes. International crimes are more than just the narrowly defined "core crimes" included in the Rome Statute. Using Bassiouni's criteria for international criminalisation supports sexual exploitation and abuse by peacekeepers being interpreted as international crimes.[165] This criteria includes the following;[166]

(a) The prohibited conduct affects a significant international national interest;

(b) The prohibited conduct constitutes egregious conduct deemed offensive to the commonly shared values of the world community, including what has been referred to as conduct shocking to the conscience of humanity;

(c) The prohibited conduct has transnational implications in that it involved or effects more than one state in its planning, preparation, or commission, either through the diversity of nationality of its perpetrators or victims, or because the means employed transcend national boundaries

(d) The conduct is harmful to an internationally protected person or interest; and

(e) The conduct violates internationally protected interest but it does not rise to the level required by (a) or (b), however, because of its nature, it can best be prevented and suppressed by international criminalization.

The relevant criteria are (c), (d) and (e). In relation to (e), I argue that forms of sexual abuse (rape, sexual violence and sexual activity with children) must be included in a list of applicable crimes within material jurisdiction of any alternative court for peacekeepers as

[165] M Bassiouni *International Criminal Law Series: Introduction to International Criminal Law* (2nd ed, Brill Nijhoff, Leiden, 2012) at 142.
[166] At 142.

that conduct has been accepted by member states and treaty bodies as "serious" in nature.[167] In regard to "sexual exploitation", I argued in Chapter Two that the primary targeted conduct is survival sex; where sex is exchanged for assistance that peacekeepers have access to or which is already owed to the local population. The relationship is based on dependency and focusses on the peacekeeper's position of power in relation to the beneficiary of assistance. Survival sex often occurs within a broader context of social and cultural inequalities (including extreme poverty) that marginalise women in post-conflict states. The presence of a (overwhelming masculine and militarised) peacekeeping force may exacerbate the inequalities that already exist. Peacekeepers will also have access to food, money, medicine, and other kinds of assistance that the local population does not and this creates the situation of differential power. They represent the international community, as well as their contributing state, and are in a position of trust within the community in which they are deployed. To abuse the unequal power dynamic by exchanging assistance for sex is exploitation and is of international concern (as argued above).

Sexual exploitation and abuse committed by peacekeepers has transnational implications. United Nations Peacekeeping Operations are made up of multi-national forces, and sexual abuse is committed in a foreign state. As personnel represent the international community under the umbrella of the UN it is argued that the criteria for (c) is met in these circumstances. Furthermore, sexual exploitation and abuse is violence against women under international human rights law, as discussed in Chapter Three. Thus, victims should be protected from such harms. As a result, I argue that peacekeepers committing sexual exploitation and abuse should meet the criteria for (d).

[167] These particular acts are considered "crimes" in the Draft Convention, art 3(2); see also discussion in Chapter Four: Sexual Exploitation and Abuse – State Obligations, particularly the following sections: "(1) Torture and Other Cruel, Inhuman or Degrading Treatment", "(2) Sexual Activity with Children", and "(3)(B) Criminalising Violence against Women".

Overall, I would suggest that "sexual abuse" (defined as rape, sexual violence and sexual activity with children)[168] and "sexual exploitation" (as survival sex) be included within the material jurisdiction of a hybrid court for peacekeepers as international crimes. The definition of "sexual exploitation" would therefore need to be drafted to reflect clearly survival sex.

(II) POLITICAL WILL

The second challenge I will discuss in relation to a special court for peacekeepers is the problem of political will. As previously noted, TCC exclusive criminal jurisdiction (for peacekeeping operations) exists as the default due to states' continuing fears surrounding the jurisdiction of another judicial institution over their military forces.[169] These fears include being subject to trials without appropriate human rights standards and the subversion of the sovereign prerogative to discipline or prosecute their own military forces.[170] Therefore, the point of this section is to discuss various options of signing up for a hybrid court for peacekeepers that may be offered in a situation of compromise to placate such fears. It also serves as an acknowledgement that a hybrid tribunal alternative for improving accountability (as with all options) is subject to the political will of states.

The first option that may be available is a so-called "opt-in" measure whereby a multilateral agreement could be used to set up the major aspects of the court, but would only be

[168] "Sexual activity with children" is included here notwithstanding the issues recognised in Chapter Two: What is Sexual Abuse and Sexual Exploitation? concerning the definition of "children" as being persons aged under18 years (for example, that the age of legal maturity will differ between states).
[169] Zeid Report, above n 1, at [80]; see also Dag Hammarskjold *Summary Study of the Experience Derived from the Establishment and Operation of the Force: Report of the Secretary-General* GA A/3943 XIII (1958) at [136]; D Fleck "Introduction" in D Fleck (ed) *The Handbook of The Law of Visiting States* (Oxford University Press, Oxford, 2001), at 5; Discussed in Part Two: Sanctions against the Troop-Contributing Countries.
[170] See generally D Fleck "Securing Status and Protection of Peacekeepers" in R Arnold and G A Knoops (eds) *Practice and Policies of Modern Peace Support Operations under International Law* (Transnational Publishers, New York, 2006) 141.

applicable to and applied by those states who have signed up. An advantage to such a mechanism is that it does not need consensus across all member states and may avoid delay caused by negotiations. An opt-in measure may also allow states which do not have the resources necessary to conduct investigations in a foreign state to share in the resources of an independent UN tribunal.[171] However, peacekeeping personnel may be treated differently depending on whether states have chosen to "opt-in" and therefore an uneven application of justice may occur. Moreover, if applied through a multilateral treaty states may be able to make reservations, perhaps limiting criminalised conduct (to exclude survival sex, for example).[172] Nevertheless, states cannot make specific reservations that target the object and purpose of the treaty;[173] as improving accountability for sexual exploitation and abuse committed by peacekeepers would be within the object and purpose of an "opt-in" measure/treaty then such reservations seeking to limit its scope may not be valid.

Another advantage of an opt-in measure may be that it could represent "best practice"; the idea that enough state interest and application would develop a model of behaviour and encourage improvement of accountability among states which were not a party. An example of best practice can be seen with the international criminal courts and their effect on non-affected states' prosecution of international crimes. It has been suggested by academics that the presence of international courts can increase the consciousness of the international community in relation to the seriousness of the conduct being prosecuted.[174] Moreover, such tribunals may encourage prosecution by domestic courts, for example, local prosecutions in the Democratic Republic of Congo against military groups for international crimes have

[171] Shany, above n 29, at 437 and 439.
[172] For general information about reservations to treaties see M Fitzmaurice "The Practical Working on the Law of Treaties" in M Evans (ed) *International Law* (4th ed, Oxford University Press, Oxford, 2014) 166, at 184-191.
[173] *Restrictions to the Death Penalty (Advisory Opinion)* Inter-American Court of Human Rights (1983) (Ser A) No. 3 at [61].
[174] Shany, above n 29, at 436.

increased since the ICC began its trials over such crimes in the territory.[175] Therefore, states that do not opt-in to a tribunal for peacekeepers may still be encouraged to exercise jurisdiction over their personnel by the practice of those states that do choose to opt-in.

A second option is an "opt-out" measure; where peacekeeping personnel would be subject to the jurisdiction of a hybrid court outright, unless the troop-contributing country could establish that it was both willing and able to investigate and prosecute offenders. This is essentially the opposite of the International Criminal Court's complementarity principle. An opt-out measure would encourage states to make the necessary changes to their domestic arrangements to investigate and prosecute their military contingent members if they wish to avoid the jurisdiction of an independent tribunal. In the interim, the jurisdiction of a hybrid court will ensure that sexual exploitation and abuse does not continue to be committed with impunity. In the early negotiations on the Rome Statute, there was some support for a similar "opt-out" measure, with support for the ICC having inherent jurisdiction, particularly over genocide.[176] The opt-out measure was rejected in favour of complementarity to reflect the primacy of national jurisdiction and achieve consensus and widespread accession to the Rome Statute.[177] Although these negotiations took place two decades ago, there is no indication that the position of states has changed in regard to complementarity. Nevertheless,

[175] At 436.
[176] International Commission of Jurists *The International Criminal Court: Third ICJ Position Paper* (presented at the 1st Preparatory Committee of the ICC, August 1995) at 30-35.
[177] United Nations Information Centre in Sydney for Australia, New Zealand and the South Pacific *Preparatory Committee on International Criminal Court Discusses Complementarity Between National, International Jurisdictions* (1st Session of the Preparatory Committee, 11th Meeting, April 1996); United Nations Information Centre in Sydney for Australia, New Zealand and the South Pacific *Preparatory Committee on International Criminal Court Continues Considering Complementarity Between National, International Jurisdictions* (1st Session of the Preparatory Committee, 13th Meeting, April 1996); United Nations Information Centre in Sydney for Australia, New Zealand and the South Pacific *International Criminal Court Should Not have Inherent Jurisdiction, Preparatory Committee Told* (1st Session of the Preparatory Committee, 15th Meeting, April 1996).

with the past and current UN reforms to improve the prevention and accountability for sexual exploitation and abuse seemingly not working,[178] perhaps it is time to revisit this position.

(III) RESOURCES

It has long been recognised that hybrid court models are resource-intensive.[179] A hybrid court for peacekeepers would likely be similarly expensive. Although it is acknowledged that a hybrid court is an expensive option and that the cost may be a barrier for states, I do not accept that a court cannot be budgeted for. United Nations' gender or victim-related projects are often under-financed, as evidenced by the recent failure to adequately fund the *United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by UN Staff and Related Personnel* (discussed below in Chapter Nine).[180] To sufficiently resource a special court for peacekeepers would require a change in approach to funding priorities.

In 2015 Malala Yousafzai (a Nobel Peace Prize recipient for her advocacy in education for girls) asked world leaders to consider diverting eight days of military spending into world-wide free education for children.[181] This figure is approximately $39 billion (USD). Additionally, a recent report regarding the UN mission in the Central African Republic and Chad revealed a surplus of unspent money (approximately $34 million USD).[182] In this

[178] As discussed in Chapter One: History of Sexual Exploitation and Abuse in Peacekeeping and UN Responses.
[179] Cohen, above n 49, at 13; Group of Legal Experts Report, above n 2, at [37]; Williams, above n 19, at 210.
[180] See for example, H Charlesworth "Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations" (2005) 18 *Harvard Human Rights Journal* 1 at 11-13; H Charlesworth "Transforming the United Men's Club: Feminist Futures for the United Nations" (1994) 4 *Transnational Law & Contemporary Problems* 421 at 432 and 447; see also, Secretary-General *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* GA A/69/779 (2015) at [68].
[181] M Khan "Malala Yousafzai: Cut 8 Days of Military Spending for 12 years of free education" *IBTIMES* (8 July 2015) www.ibtimes.co.uk.
[182] Report of the Secretary-General *Final Performance Report of the United Nations Mission in the Central African Republic and Chad* GA A/70/559 (2015). Also noted by G Mathurin "Put Victims First: Time for UK Leadership at the UN" (media release by AIDS-Free World, 25 November 2015).

report the Secretary-General recommended this surplus be credited to member states.[183] Perhaps, such money could be redirected into other projects related to peacekeeping, such as a hybrid court for peacekeepers.

Past examples of hybrid courts of a similar kind indicate the best method (so far) for resourcing is to set up a specific fund in which member states, and other interested parties, pay into on a regular basis.[184] In his 2015 report, the Secretary-General stated the desire to set up a voluntary fund for victim assistance (related to sexual exploitation and abuse).[185] As a voluntary fund has already been proposed to respond to sexual exploitation and abuse, the financing of a special court for peacekeepers could also be attached to such a fund.

Overall, the question of resourcing will inevitably be an issue when proposing any new mechanism at the international level. Currently, there appears to be enough money available to finance peacekeeping operations, as seen in the above example where there was a surplus of money for the mission in the Central African Republic. If there is enough money to send peacekeeping personnel to missions abroad, then there should be enough money available to ensure accountability for crimes committed by such personnel. Sexual exploitation and abuse is a human rights issue, and ultimately, if the international community (particularly the UN) is serious about human rights protection and accountability for violations, adequate resources will be found and allocated accordingly.

[183] *Final Performance Report of the United Nations Mission in the Central African Republic and Chad*, above n 152, at [7].
[184] This was the case with the Special Court of Sierra Leone, although still underfunded the Special Court was far better resourced than the Special Panels in East Timor where funding was located within the UN mission budget: see Cohen, above n 49, at 13 and 25; Williams, above n 19, at 211.
[185] *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* (2015), above n 180, at [65]-[66].

(D) How Would a Hybrid Tribunal Work?

Having discussed why a hybrid tribunal could apply to the peacekeeping context in response to sexual exploitation and abuse committed by military contingent personnel it is useful to examine generally how such a hybrid tribunal might work.

One of the most egregious early reports of sexual abuse included the media exposure of the story of "Elizabeth", a 12 year old girl who was raped by 10 peacekeepers on her way home from school in Côte d'Ivoire.[186] When her story was brought to public attention in 2007, none of her attackers were prosecuted.[187] Left too traumatised to leave her village, Elizabeth and her community never saw justice being done. Under a hybrid tribunal for peacekeepers, cases like Elizabeth's would certainly be dealt with differently.

Upon an allegation of sexual exploitation and abuse, such as rape, an investigative team (perhaps drawn from a roster of related-expertise) made up of representatives of the host state (if appropriate), and the troop-contributing state concerned, and led by the investigative arm of the UN, would undertake a preliminary and formal investigation. This would avoid the current issues related with the MOU structure which can potentially involve many different entities investigating the same allegation (or none at all). Where appropriate, the cooperative element ensures some host state ownership and inclusivity, thus bringing some legitimacy to the process. With the UN taking the lead there should be an assurance of transparency. The cooperative element, having been pre-agreed would mean the outcome of the investigation would be reached within a reasonable timeframe. This can be contrasted

[186] M Pflanz "Six-year-olds Sexually Abused by UN Peacekeepers" *The Daily Telegraph* (26 May 2008) http://www.telegraph.co.uk/news ("Elizabeth" is a pseudonym): Also mentioned briefly in Chapter One of this thesis.
[187] Above n 186.

with the current process under the MOU, where an inquiry into an allegation can take an average of 12 months.[188]

Upon a positive investigation and decision to prosecute, the victim would see justice being done through the trial of their perpetrator taking place within the community via a hybrid court. The trial would be seen as legitimate and transparent because the host state would have some ownership in the process and running of the court itself. Unlike the status quo, where outcomes of cases are rarely reported back to the victim and their communities, the victim would have direct access to trial outcomes; so too would the international community. Upon conviction, any sentence could be served in the perpetrator's home state (similar to the procedure under the International Criminal Court).[189]

CONCLUSION

In this chapter I argued that the three principles underlying this thesis would be best served by a hybrid court for peacekeepers. Justice is "seen to be done" by a hybrid model because it operates within the territory where the crime took place and where the victim's community reside. Where appropriate, mixed personnel in investigation, prosecution, and day-to-day running of the court, including the host state community, would ensure some host state ownership of the mechanism. UN leadership should be facilitated by administration of such a tribunal and initiation of a treaty or negotiation process in which to legally base a tribunal of this kind.

One of the major differences between my suggested model and those that have been argued in previous scholarship is the removal of the troop-contributing country's exclusive criminal jurisdiction. Instead of a court of "last resort" I have argued for a court of first instance. A

[188] See *Evaluation Report*, above n 147, at [30].
[189] Rome Statute, art 103.

court with secondary jurisdiction will not materially change the accountability gap as TCCs would have to be deemed "unwilling and unable" to exercise jurisdiction. The evidence needed to prove a state was "unwilling" or "unable" to investigate or prosecute would cause lengthy delay and such delay would hinder the chances of successful prosecution. It would not improve accountability.

In terms of structure, I have argued that the legal basis for a tribunal should be a combination of a multilateral treaty (for the primary attributes such as material jurisdiction) and amended versions of the Model-MOU and Model-SOFA (for the details to be negotiated, such as the mixed personnel and involvement of the host state).

Forms of "sexual abuse" such as rape, sexual violence and sexual activity with children should be included within the jurisdiction of such a tribunal and are most likely unproblematic. I have argued further that sexual exploitation, as survival sex, and sexual abuse are international crimes.

Overall, if the goal is to improve accountability of military contingent members who commit sexual exploitation and abuse, then the option must be visible and legitimate in the eyes of the victims and the international community. A hybrid court for peacekeepers will ensure the policy of host state inclusivity, transparency and fairness, and that the UN takes leadership in responding to sexual exploitation and abuse. In Chapter Nine I expand on the idea of a hybrid court, with particular focus on victims, their participation, and reparations.

CHAPTER NINE: VICTIM INCLUSIVITY AND RESPONDING TO VICTIMISATION BY PEACEKEEPERS

INTRODUCTION

Victims of crime have not traditionally been at the centre of international (or domestic) criminal justice theories or institutions. However, within recent decades there has been a clear trend to increase the role of victims in criminal justice processes.[1] This development parallels victims' rights to effective remedies under international human rights law. As I have argued that a hybrid court best serves the three conceptual principles outlined in Part One and so improves accountability, I will attempt to link a special court for peacekeepers with the discussion on the appropriate response to victims of sexual exploitation and abuse in this chapter. Such responses should also align with the principles; justice seen to be done, host state ownership, and UN leadership.

In section (1) I will examine victims' rights to participation during criminal trials. This will firstly, include an overview of applicable participatory rights, the various restorative justice models (which centre the role of victims) and the involvement of victims in proceedings in the International Criminal Court (ICC). Secondly, I will explore victim reparations under international human rights, particularly those relating to violence against women. Thirdly, the ICC's Trust Fund for Victims will be considered as an example of an international criminal institution's approach to implementing effective remedies.

[1] See discussion below (1) The Role of Victims in International Criminal Justice.

Section (2) will look at that status quo in regard to the current response to victims of sexual exploitation and abuse committed by Peacekeepers. This will detail the *United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by UN Staff and Related Personnel* and its current implementation (or lack thereof). Arguably, the UN Strategy and response mechanism is inadequate, particularly in light of the responses expected by human rights bodies to contend with violence against women.

I will conclude that a special court for peacekeepers should better incorporate the participation of victims. Such participatory rights should include the right to information, the right to be heard (before and during trial) and for victims to feel secure enough to participate safely. Participation itself supports the principle of justice being seen to be done and a policy of inclusivity. Moreover, reparations should be "transformative" in nature. This means assistance and support to victims should be beyond immediate or emergency care, but also forward-looking. Such reparations should also aim to dismantle societal and cultural structures that create and support gendered violence, both within peacekeeping and the local community in which the UN operates. Thus the UN should take leadership in the response to victims of sexual exploitation and abuse and also work with local networks to implement such responses (supporting host state ownership).

(1) The Role of Victims in International Criminal Justice

Traditionally, international (and domestic) criminal justice theory has marginalised the role of victims. Until relatively recently, the punishment of offenders was considered the sole purpose of criminal institutions. Under the criminal justice theory of "retribution" the role of victims has been understood as less integral to the criminal process.[2] Victim participation

[2] B Leyh *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia, Cambridge, 2011) at 37.

under such purely retributive models is restricted to victim-as-witness to provide information about the wrongdoing that took place.[3] Not only are victim participatory rights largely ignored under retribution theory, but so are other victims' rights generally, including the right to effective remedies.

During the "victims' rights movement" of the 1960s there was a push for more participatory rights and remedies for victims in the criminal justice process. This push primarily came from victims' groups and non-governmental organisations (NGOs), and paralleled the development of victim reparations in international human rights law. Early victimology academic reports from the United States illustrated mass underreporting of victimisation due to distrust in law enforcement and the criminal justice system.[4] This corresponded with the women's rights movement in the United States, which highlighted the issue of underreporting of violence against women (particularly domestic violence and rape) where victims felt unsafe and isolated from the criminal justice system.[5] Criminal institutions which include greater victim participation and long-term remedies generally take on a "restorative justice model". Under restorative justice, greater emphasis is placed on victim participation and on repairing the harm caused to the victim and their community, whilst often including the offender in that process.[6]

[3] Leyh, above n 2, at 41; R Henham and M Findlay *Exploring the Boundaries of International Criminal Justice* (Ashgate, Furnham, 2011) at 86.
[4] This was also due to racial tensions surrounding the US civil rights movement see L W Sherman *Trust and Confidence in Criminal Justice* (2001) available online <www.ncjrs.org> at 4-5; A M Cellini "The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim" (1997) 14 *Arizona Journal of International and Comparative Law* 839 at 848-856; see also J T Davis "The Grassroots Beginnings of the Victims' Rights Movement" (2005) *National Crime Victim Law Institute News*.
[5] Cellini, above n 4, at 853; Davis, above n 4.
[6] H Strange "Exploring the Effects of Restorative Justice on Crime Victims for Victims of Conflict in Transitional Societies" in S G Sholham, P Knepper and M Kett (eds) *International Handbook of Victimology* (Taylor and Francis, Hoboken, 2010) 537 at 538.

There are various modalities in which restorative justice is practiced; these include victim-offender mediation, rehabilitation services, victim compensation schemes, and community service.[7] At the international level, restorative justice is practiced through alternative dispute resolution mechanisms, such as Truth Commissions, rehabilitative services and support for victims, and greater participatory rights in international tribunals. When it comes to international criminal tribunals there is still tension between traditional retributive models and more restorative models. However, some international institutions have been embracing restorative aspects of criminal justice and thus implementing a wider concept of victim participation.

There are three parts to this section on the role of victims in international criminal justice. First I will explore victim participation in international criminal institutions. This will include examining examples of implementing victim participation, such as the International Criminal Court. Secondly, I will consider victims' rights to an effective remedy under international human rights law, particularly those that would apply to sexual exploitation and abuse by peacekeepers. Thirdly, I will discuss the example of victim reparations under the International Criminal Court's Trust Fund for Victims. In Chapter Eight I argued for a hybrid court for peacekeepers. My objective in this section is to consider what role victims of sexual exploitation and abuse might play in such a court for peacekeepers under current norms (or norms to be developed) and what reparations (if any) victims should expect.

(A) VICTIM PARTICIPATION IN INTERNATIONAL CRIMINAL INSTITUTIONS

In order to determine suitable ways to include victims of sexual exploitation and abuse into a special court for peacekeepers, it is necessary to explore victim participatory rights under

[7] See generally J P Vevan, G Hall, I Froyland, B Steels and D Goulding "Restoration or Renovation? Evaluating Restorative Justice Outcomes" (2005) 12 *Psychiatry, Psychology and Law* 194.

current international norms. As restorative criminal justice theories tend to value the role of victims, I will also investigate the different restorative justice models. A current example of an international criminal institution which has mixed retributive-restorative goals is the International Criminal Court. Overall, the ICC's mixed model has received mixed feedback from academics. However, various victim rights groups have praised the approach to victim participation; only practical improvements have been recommended.

(I) VICTIM PARTICIPATORY RIGHTS

Victims of sexual or gendered violence are likely to experience various obstacles to full participation in the criminal process. Such obstacles could include the need for immediate or emergency care in the case of sex crimes, gender discrimination, the lack of financial aid or information, social stigma, and issues relating to protection.[8] Therefore, for victim participation to be meaningful such rights need to be made available and these perceived barriers mitigated. Victim participatory rights during criminal trials have developed relatively recently. Of the most important rights, the right to information, the right to be heard, and the securement of victim(s) safety are perhaps the most applicable to responding to sexual exploitation and abuse by peacekeepers. Incorporation of victims in the criminal procedure also supports the principle of justice being seen to be done and a policy of inclusivity.

The victims' rights campaign during the 1960s, noted above, advocated for greater participatory rights before and during criminal proceedings.[9] Additionally, campaigners

[8] REDRESS *Participation in transitional Justice Processes by Survivors of Sexual and Gender-based Violence* (Submission to the Office of the High Commissioner of Human Rights, 2014) at 6.
[9] Leyh above n 2, at 45; M C Bassiouni "International Recognition of Victims' Rights" (2006) 6 *Human Rights Law Review* 203 at 210; C Hoyle and L Ullrich "New Court, New Justice? The Evolution of "Justice for Victims" at Domestic Courts and at the International Criminal Court" (2014) *International Criminal Justice* 1 at 2-3; C P Trumbull "The Victims of Victim participation in international Criminal Proceedings" (2008) 29 *Michigan Journal of International Law* 777 at 781.

argued for improved services-related support for victims participating in the criminal justice system.[10] These goals are supported by the few examples of empirical research available that investigate victims' impression/experience of the criminal process.[11] Research which looked at what victims perceive as "fairness" during the trial show that victims greatly appreciate receiving information about their rights, the procedure, and the outcome of their case.[12] Victims' "right to information" has also been increasingly acknowledged by human rights bodies as part of the right to an effective remedy.[13]

Moreover, empirical research reveals that victims actively participating during trial value being "heard" and appreciated protection in which to do that.[14] Victim participation can also offer victims the ability to take ownership over part of the process, which can have an empowering and rehabilitative effect.[15] Such empowerment may be especially beneficial to vulnerable or marginalised groups, such as victims of sexual violence. Post-trial, victims want some form of reparation.[16] For the most part, these expectations and demands have been incorporated into the collective body of victims' rights in contemporary international criminal justice theory.[17] Overall, the restorative justice direction of the victim rights'

[10] Leyh, above n 2, at 45.
[11] Leyh, above n 2, uses the following source (which ties together the few examples of empirical research in this area, which looks at victims participating in domestic criminal and civil courts) J Thibaut and L Walker *Procedural Justice: A Psychological Analysis* (Lawrence Erlbaim, New Jersey, 1975).
[12] Leyh above n21, at 49; J Wemmers "The Meaning of Justice for Victims" in S G Sholham, P Knepper & M Kett (eds) *International Handbook of Victimology* (Taylor and Fancis, Hoboken, 2010) 27, at 34 and 38.
[13] *Gulec v Turkey(Judgement)* (1998) no 21593/93 (ECHR) at 82; *Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa* DOC/05/(XXX)247 (2001) at Section C(b)(1-3); Fourth World Conference on Women *Beijing Declaration and Platform for Action* A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995) at [227]; Leyh, above n 2, at 108.
[14] Leyh, above n 2, at 49-50.
[15] S Kelly "The Role of Victims in the International Criminal Court: Challenges & Opportunities" (2012) 18 *New England Journal of International & Comparative Law* 243 at 246.
[16] Leyh, above n 2, at 51; however, research into what victims want and expect out of criminal proceedings (particularly international criminal institutions) is still an underdeveloped area see Henham and Findlay above n 2, at 86.
[17] Leyh, above n 2, at 93.

movement and the few empirical studies that do exist have influenced the development of participatory rights for victims.

A key international legal instrument that looks at victims' participatory rights is *The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985* (Basic Principles 1985).[18] Based on art 8 (the right to an effective remedy) of the Universal Declaration of Human Rights (UDHR), the Basic Principles 1985 provide guidance to states on implementing such a right to remedies, with a particular focus on participation during criminal proceedings.[19] The document is not a source of law, rather its provisions must first be implemented by states (along with any human rights norms in which the right to an effective remedy is attached, such as the *International Covenant on Civil and Political Rights* (ICCPR)).[20]

Concerning victims of crime, the Basic Principles 1985 encourage judicial and administrative procedures to respond to the particular needs of victims.[21] The Principles reiterate the importance of providing information to victims regarding their rights, the criminal procedure, outcomes, and when victims have specifically requested such information.[22] Allowing the victim to express their views at "appropriate stages" of the proceedings is also encouraged.[23] The Principles also dictate that victims should be provided assistance during the process and that their privacy and safety should be protected.[24] The protection of victims and witnesses (particularly vulnerable groups such as women and children) who participate during the criminal process has been considered an "emerging

[18] *The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* GA Res A/Res/40/43 (1985): [Basic Principles 1985].
[19] Bassiouni above n 9, at 216.
[20] At 217 and 246: *International Covenant on Civil and Political Rights* 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976): [ICCPR].
[21] Basic Principles 1985, art 6.
[22] At art 6(a).
[23] At art 6(b).
[24] At art 6(c)-(d).

right" and highlighted under several international legal documents (and picked up by the International Criminal Court).[25]

For victims of sexual offences, fulfilling the right to be heard during the criminal justice process can be both a healing and empowering act. However, depending on the circumstances, participation may also be re-victimising; the element of protection must take precedence in such circumstances. From the above discussion, it seems that the right to information is very important to victims and should also be implemented in the context of sexual exploitation and abuse committed by peacekeepers. Moreover, for particularly vulnerable or marginalised groups of victims the need for protection must be met in order for participation to be safe and meaningful. As stated above, restorative justice theories have embraced the role of victims in criminal proceedings; below I will consider the various kinds of restorative models.

(II) RESTORATIVE JUSTICE MODELS

There is a clear movement in international criminal justice towards restorative models or at least mixed-models in order to implement victim participatory rights. There are different modalities of restorative justice that have been used in different contexts; some may be more suitable to responding to victims of sexual exploitation and abuse than others.

As stated above, there is some tension between legal experts who suggest victims should participate during trial[26] and those who argue that victim participation hinders the accused's

[25] Bassiouni, above n 9, at 258; see for example, Committee on the Elimination of Discrimination Against Women *Concluding Observations on the Combined Sixth and Seventh Periodic Reports of the Democratic Republic of the Congo* CEDAW/C/COD/CO/6-7 (2013) at [10(d)]; Committee on the Rights of the Child *Concluding Observations on the Combined third, fourth and fifth Periodic Reports of Hungary* CRC/C/HUN/CO/3-5 (2014) at [59].

[26] S M Mitchell "Restorative Justice, RPF Rule, and the Success of Gacaca" in H F Carey and S M Mitchell (eds) *Trials and Tribulations of International Prosecution* (Lexington Books, Lanham, 2013) 255 at 258.

right to a fair trial.[27] On the one hand, long procedural delays caused by incorporating victim participation interfere with the accused's right to an expeditious trial.[28] Moreover, there is a chance that crimes which emotionally impact and cause further suffering to victims may endanger the Court's impartiality.[29] On the other hand, it has also been argued that purely retributive criminal institutions, particularly in post-conflict settings, do not take the wider context of trust and reconciliation into consideration.[30] For instance, the context of structural violence and discrimination against women may not be taken into account where the outcomes of the criminal court are solely driven by retributive justice.[31]

Restorative justice models are still developing, and there are different approaches within restorative criminal justice theory. Some domestic models tend to focus on victim-offender interaction; where both the victim and the offender participate equally in the proceedings, the harm is acknowledged and the victim is in an empowered position to express their views directly to the offender.[32] In the context of sexual offences however, this approach may not be appropriate. Direct victim-offender contact or interaction can be re-traumatising for the victim. Moreover, there may continue to be an uneven power dynamic operating between the UN peacekeeper (perpetrator) and beneficiary of assistance (victim) that may compound the harm already suffered by the victim.

When it comes to responding to post-conflict, there has generally been a restorative objective to accountability.[33] This has seen the introduction of Truth Commissions, participation in

[27] Wemmers, above n 12, at 29.
[28]B McGonigle Leyh "Victim-Orientated Measures at International Criminal Institutions: Participation and its Pitfalls" (2012) 12 *International Criminal Law Review* 375 at 399; REDRESS *The Participation of the Practice and Consideration of Options for the Future* (London, 2012) at 6; S Zappala "The Rights of Victims v The Rights of the Accused" (2010) 8 *Journal of International Criminal Justice* 137 at 145-146.
[29] McGinigle Leyh, above n 28, at 401; Zappala, above n 28, at 147-148.
[30] Mitchell, above n 26, at 258.
[31] At 258.
[32] At 258.
[33] Leyh, above n 2, at 59.

hybrid tribunals, and the notion of collective reparations. Truth Commissions have been utilised alongside hybrid courts, such as in Sierra Leone. Truth Commissions serve a complementary role to the prosecution of offenders, and include the active participation of both victims and perpetrators.[34] These Commissions have multiple goals; to create a historical record of mass atrocities, to promote community-wide healing and reconciliation, and to help prevent future egregious violations of human rights.[35] Additionally, such Commissions fulfil the right to truth and for victims to have their story "heard" after mass atrocities have been committed.[36]

Truth Commissions have been implemented in specific contexts, involving mass crimes against humanity or war crimes. Moreover, the goals relating to transitional justice may not be at all applicable to the context of responding to victims of sexual exploitation and abuse by peacekeepers. Acts of sexual exploitation and abuse are typically opportunistic in nature, and not part of a wide-spread policy of peacekeepers or state officials. Truth Commissions help with recording events of mass atrocities such as genocide, rather than individual so-called "ordinary" crimes.[37] Moreover, at the end of a mission the peacekeepers leave the country – thus there is no need for "reconciliation" between peacekeepers and locals. Therefore, it is unlikely that Truth Commissions would be appropriate for responding to victims of sexual exploitation and abuse.

Other models that have been taken up by certain international criminal institutions, such as the International Criminal Court, have more reparative or transformative goals. Such restorative criminal justice systems aim to incorporate victim participation and also award

[34] At 158-159.
[35] W A Schabas "Internationalised Courts and Their Relationship with Alternative Accountability Mechanisms: The Case of Sierra Leone" in C P R Romano, A Nollkaemper and J K Kleffner (eds) *International Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press, Oxford, 2004) at 157.
[36] Bassiouni, above n 9, at 276.
[37] At 276.

reparations that address issues beyond those of the victim-offender but also the wider context of social-economic structural inequalities (the Trust Fund for Victims is an example of this I discuss further below).[38]

(III) International Criminal Institutions and Victim Participation

Current practice of international criminal institutions suggests a trend to incorporate victim participatory rights. Although the hybrid tribunals have (mostly) failed in putting rights into practice, the International Criminal Court has been praised for its work with victims and victim participation during trial. Arguably, the more appropriate restorative justice model (compared to those discussed above, such as Truth Commissions) is to incorporate participation during criminal trial, such as in the ICC; thus, a special court for peacekeepers with mixed retributive-restorative justice goals may be the most suitable mechanism for victims of sexual exploitation and abuse.

Out of the international criminal tribunals of a hybrid model, the Extraordinary Chambers in the Courts of Cambodia (ECCC) has been the only example to successfully transfer participatory rights of victims into practice. The Special Panels of East Timor for example had extensive measures available for victim participation and reparations in its regulations. Under its regulations, participation in the Special Panels went beyond victim-as-witness and included the ability to request a specific investigation, the right to be heard at a review hearing, the right to be notified of hearings and progress of cases and the right to request a review of the Prosecutor's decision not to investigate and/or prosecute.[39]Although such

[38] Mitchell, above n 26, at 258.
[39] *Regulation 2000/30 On Transitional Rules of Criminal Procedure* UNTAET/REG/2000/30 (2000); *Regulation 2001/25 (amendment) On Transitional Rules of Criminal Procedure* UNTAET/REG/2000/25 (2000) at 12.1-12.8; Leyh above n 2, at 153.

provisions reflected rights outlined in the Basic Principles 1985, they were never utilised in practice due to a lack of resources (both financial and human) and political will.[40] Contrasted with the failed practice of the Special Panels, the ECCC could be considered (mostly) successful in implementing similar provisions in comparison. The ECCC Internal Rules noted three modes of victim participation, as "complainant", as "civil party" or as witness. Victims participating as a "civil party" are granted the most rights under the Rules, allowing for participation during criminal procedure and reparation claims.[41] Such rights include access to information, such as the case file itself, to make submissions, attend hearings and question accused (though legal representation), and request reparations.[42] Although praised by commentators for its significant incorporation of victim participatory rights, the ECCC has also been heavily criticised by victims themselves for not meeting expectations and for lengthy delay in proceedings.[43] Information regarding outcomes for victims needs to remain realistic in a post-conflict setting.[44] Moreover, with the sheer number of victims requesting participation delays are unavoidable and may only be mitigated by simplifying the application process as much as possible.

The Rome Statute of the International Criminal Court has been deemed a significant step forward for victim participatory rights and transformative justice.[45] Non-governmental

[40] *Report to the Secretary General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (the East Timor) in 1999* S/2005/458(Annex II) (2005); Leyh, above n 2, at 154; E Evans *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press, Cambridge, 2012) at 112.

[41] Civil parties are those victims who have suffered physical, mental or material harm directly from an international crime.

[42]See *Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 9)* ECCC (January 2015) at Rules 23, 23 *quinquies*, 83, 86, 90, 92, 94.

[43] Leyh, above n 2, at 179.

[44] Schabas, above n 35, at 541; the need for clear communication of expectations from proceedings was also important to victims in the experience of the Special Court for Sierra Leone see Special Court for Sierra Leone – Witness and Victims Section *Best-Practice Recommendations for the Protection & Support of Witnesses: An Evaluation of The Witness & Victims Section of the Special Court for Sierra Leone* (2008) at 13.

[45] C McCarthy *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press, Cambridge, 2012) at 46; Henham and Findlay, above n 3, at 86; Hoyle and Ullrich above n 9, at 4; Kelly, above n 15, at 244.

organisations and victims' rights groups advocated for greater victim participation during the negotiation of the Rome Statute.[46] Thus, the Rome Statute and Rules of Procedure and Evidence have created a sophisticated approach to victims' rights and remedies.[47] Victims may participate during legal proceedings, have a right to be protected and the right to reparations.[48] Additionally, the Rome Statute established a Trust Fund for Victims which facilitates long-term reparations for victims and their communities.[49]

Article 68(3) of the Rome Statute dictates that victims as participants may express their views at all levels of proceedings, if such participation does not impinge on the rights of the accused to a fair trial. This encapsulates a general right of victim participation in ICC proceedings.[50] Victims may have their views considered at any time during proceedings, make opening and closing statements and may be called upon by the Pre-Trial Chamber when the Prosecutor is deciding on investigations.[51] The ICC's definition of "victims" also recognises that serious human rights crimes (such as torture and genocide) can have an effect beyond the individual, and victims may also be family members, dependants and the wider community.[52] As participation is at the discretion of the court there has been little in the way of consistent application, thus potentially circumventing the principle of legal certainty.[53] However, applications for victim participation must be considered case-by-case in order to appropriately balance the rights of the accused against the victim's right to participate

[46] Although incorporated last minute due to a prolonged lack of consensus among state representatives Leyh above n 2, at 232-234; McCarthy, above n 45, at 50; Kelly, above n 15, at 247.
[47] *Rome Statute of the International Criminal Court* 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002): [Rome Statute]; The Rules of Procedure and Evidence *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court* ICC-ASP/1/3 and Corr. 1 Part II.A (New York, 2002): [Rules of Procedure and Evidence].
[48] Rome Statute, arts 43, 57, 68, 68(3), 79 and 85; Bassiouni, above n 9, at 230.
[49] Rome Statute, art 75.
[50] Kelly above n 15, at 251.
[51] Rome Statute, arts 15(3), 19(3), 68(3).
[52] Rules of Procedure and Evidence, above n 47, at Rule 85; Kelly, above n 15, at 247.
[53] McGonigle Leyh, above n 28, at 404.

(taking into account the needs to all victims, particularly children or victims of sexual violence).[54]

As victim participation is at the discretion of the particular Chamber, jurisprudence is very essential to its development; an important case in this regard is *Prosecutor v Lubanga*. The Trial Chamber has accepted the right of victims to lead evidence at trial and challenge the admissibility of evidence, without being a party to the proceedings.[55] The right of participation in such a way is attached to victims' role to assist the ICC in determination of truth.[56] At pre-trial level, victims may also participate by providing their views and concerns regarding investigation.[57] Victims may also have access to public material relating to cases, and in some circumstances, may request confidential materials.[58] Additionally, victims may attend all public hearings and, in some circumstances, closed hearings.[59]

Article 86 of the Rome Statute (which provides that the ICC shall take into account the needs of all victims and witnesses, particularly children and victims of sexual or gender violence)[60] is partially facilitated through the Victims and Witnesses Unit.[61] The Court may order the protection of witnesses both before and during trial.[62] Such protection includes physical and

[54] Rules of Procedure and Evidence, above n 47, at Rule 86.
[55] Victims are framed as "participants" under the ICC rather than parties see H Friman "The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?" (2009) 22 *Leiden Journal of International Law* 485 at 493; *Prosecutor v Lubanga Dyilo Judgment on the appeals of the Prosecutor and the Defence against trial Chamber I's Decision on Victims' Participation of 18 January 2008* ICC Appeals Chamber ICC-01/04-01/06-1432, 11 July 2008) at [94-105].
[56] Rome Statute, arts 64(6)(d) and 69(3).
[57] *Situation in Democratic Republic of Congo Decision on the Applications for Participation on the Proceedings of VPRS 1, VPSRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6* ICC Pre-Trial Chamber ICC-01/04-101, 17 January 2006.
[58] *Prosecutor v Lubanga Dyilo (Situation in the Democratic Republic of the Congo) Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06, and a/0003/06 at the Confirmation Hearing ICC Pre-Trial Chamber* ICC-01/04-01/06, 22 September 2006 at 7-8.
[59] *Prosecutor v Lubanga Dyilo (Situation in the Democratic Republic of the Congo) Decision on Victims' Participation* ICC Trial Chamber ICC-01/04-01/06-1119, 18 January 2008 at [113].
[60] Child witnesses are also required special protection (physical and legal) under the *Convention on the Rights of the Child* 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990): [CRC]; See also Committee on the Rights of the Child *Concluding Observations on the combined third and fifth periodic report of Hungary* CRC/C/HUN/CO/3-5 (2014) at [59].
[61] Rome Statute, art 43(6).
[62] Rome Statute, arts 57(3)(c), 68; Rules of Procedure and Evidence, above n 47, at Rule 87.

psychological wellbeing, safety and privacy.[63] In order for victims to participate (especially as witnesses) safeguards need to be put in place to ensure their security and confidence in the Court.[64] This is particularly true of victims of sexual offences, for which the ICC ensures special protection measures.[65]

The mixed retributive-restorative goals pursued by the ICC have come under criticism by some, claiming that it is unlikely that the Court will receive enough resources (human and financial) to realistically achieve both.[66] Victim participation itself adds many hours and long delays for applications to be processed by the Registry's Victim Participation and Reparations Section.[67] For example, in 2011 there had been over nine thousand applications for participation in the situation in the Democratic Republic of Congo with only approximately three thousand processed.[68] However, the sheer number of applications point to the clear interest victims have in participation.[69] Not only may the extensive participatory rights of victims compromise the rights of the accused, the wider transformative justice aims may undermine the so-called ultimate goal of the ICC – to punish offenders.[70] Moreover, these "expansive" goals may conflict with the neutrality/non-political aspect of criminal institutions.[71] However, the approach taken by the ICC and the Trust Fund for Victims

[63] Rome Statute, art 68(1).
[64] S N Ngane "Witnesses before the International Criminal Court" (2009) 8 *The Law and Practice of International Courts and Tribunals* 431 at 449.
[65] See Rome Statute, art 68.
[66] Hoyle and Ullrich above n 9, at 10 and 18; M Damaska "What is International Criminal Justice?" (2008) 83 *Chicago-Kent Law Review* 329, at 330 and 343; Kelly, above n 15, at 260.
[67] REDRESS "Hundreds of Victims Prevented from Participating in Crucial Court Hearings due to Lack of Resources at the International Criminal Court" (press release, 15 July 2011); M Pena and G Carayon "Is the ICC Making the Most of Victim Participation?" (2013) *The International Journal of Transitional Justice* 1 at 10.
[68] See C Van der Wyngaert "Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge" (2011) 44 *Case Western Reserve Journal of International Law* 475 at 482.
[69] *The Participation of the Practice and Consideration of Options for the Future* above n 27, at 10.
[70] Hoyle and Ullrich, above n 9, at 10; Damaska, above n 66, at 331.
[71] Hoyle and Ullrich, above n 9, at 16.

(discussed more below) has arguably broadened the definition of international criminal justice to include a more holistic perspective.[72]

For all of the criticism, it appears the general impression of victim participation is that it plays a valuable part in the workings of the International Criminal Court.[73] In fact, only logistical or practical recommendations have been made by victim groups in order to make participation more meaningful for participants and manageable for the Court.[74] Moreover, an outreach programme to get more information into the wider community in which the ICC operates has been a priority.[75]

In summary, the implementation of victim participatory rights, which include the right to information, the right to be heard and security/protection in which to participate must be balanced against the rights of the accused to a fair trial. Thus, the ICC embraces mixed restorative-retributive goals. It appears that this mixed model has been receiving positive feedback from victims' rights groups with only practical or logistic improvements being formally recommended.

However, the heavy participatory element of the International Criminal Court may not be appropriately transferrable into the context of a hybrid court for peacekeepers. Victims under the ICC system are seen as having valuable experience and insight regarding their community which has suffered massive human rights violations (such as genocide).[76] These crimes harm more than individuals, but devastate entire communities.[77] Thus, the ICC needs

[72] At 11.
[73] *The Participation of the Practice and Consideration of Options for the Future*, above n 28, at 24; see also Victims' Rights Working Group, "Making Victim Participation Effective and Meaningful" (June 2014).
[74] Such recommendations include strengthening outreach to victims and simplifying the application process see *The Participation of the Practice and Consideration of Options for the Future*, above n 28, at 24.
[75] See for example, International Criminal Court *Integrated Strategy for External relations, Public Information and Outreach* available online <www.icc-cpi.int>.
[76] Pena and Carayon, above n 67, at 7.
[77] At 7.

to consider the historical context of these crimes, from the point of view of the victims. Moreover, these crimes are committed by members of the same community, or their state officials. The context of peacekeeping may be compared, where sexual exploitation is committed by foreign personnel against individual locals, living (temporarily) in the same country. Insight into historical context may not be necessary. Nevertheless, the particular context in which sexual exploitation and abuse occurs may still be important. Victims of sexual exploitation may have insight and views that expose the structural inequalities that exist and shed light on the nature of the exploitation itself. Therefore, although the high level of victim participation that is warranted under the ICC may not be as necessary in a hybrid court, some level of inclusivity of victims and their views would be of some value.

Under a hybrid court for peacekeepers, a victim of sexual exploitation and abuse may benefit from participation beyond acting as a witness. The three principles of justice being seen to be done, host state ownership, and UN leadership are about inclusivity, legitimacy, and transparency. Thus, a mixed retributive-restorative justice system may best serve these principles. The mixed model sees the goal of prosecuting the offender, whilst also incorporating the opportunity for victims to have their voices heard, to be included and see justice being done. A victim of sexual exploitation and abuse may have their voices heard by being consulted by the court or submit their views of the charges and reparations (see discussion on reparations below). For legitimacy and fairness, and fulfilment of the right to information, victims of sexual exploitation and abuse should be partial to material regarding their cases and have the ability to attend hearings. Victims of sexual violence may also need to feel safe and secure enough to participate fully, so there is a need for guaranteeing their safety as participants. A hybrid court for peacekeepers should therefore have a way to facilitate the security of victims who participate in proceedings.

(B) VICTIM REPARATIONS AND INTERNATIONAL HUMAN RIGHTS

When looking over the body of international human rights norms associated with victims and their rights to remedies there appear to be the following key elements; firstly, that victims have a right to an "effective" remedy and should be informed of that right and ways they can access related mechanisms; secondly, that states are expected to provide rehabilitation services; and thirdly, that reparations for victims of violence should also be forward-thinking with a focus on dismantling discriminatory structures and inequalities that foster gendered violence.

It was acknowledged by the Special Rapporteur on violence against women in 2010 that "coherent theory and practice for remedies does not exist under international law".[78] Nevertheless, international human rights instruments and associated monitoring bodies have confirmed a right of effective remedies for victims of serious violations of human rights.[79] Victims' access to justice has been increasingly seen as forming part of the right to an effective remedy under international human rights norms.[80] However, prosecution of the offender is not enough to discharge the obligation to provide a remedy.[81] Therefore, victim participation during trial is not enough. There must also be steps taken to respond to the needs of victims in the form of reparations.[82]

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[78] Rashida Manjoo *Report of the Special Rapporteur on Violence against Women, it's Causes and Consequences* A/HRC/14/22 (2010) at [13].
[79] At [13].
[80] R Burke "Shaming the State: Sexual Offences by UN Military Peacekeepers and the Rhetoric of Zero Tolerance" in G Heathcore and D Otto (eds) *Rethinking Peacekeeping, Gender and Equality and Collective Security* (Palgrave Macmillan, Basingstoke, 2014) at 85; Bassiouni, above n 9, at 212, 263-266;
[81] Burke "Shaming the State ", above n 80; see also Manjoo (2010), above n 78; Human Rights Committee *General Comment No 31: The nature of the general legal obligation imposed on States Parties to the Covenant* CCPR/C/21/Rev.1/Add.13 (2004) [General Comment No 31] at [16]; Committee on the Elimination of Discrimination Against Women *General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women* CEDAW/C/2010/47/GC.2 (2010) at [32].
[82] *Resolution Adopted by the General Assembly, Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action* GA Res A/RES/S-23/3 (2000) at [68(b)].

Alongside the role of victims in international criminal justice, there have also been important developments for victim reparations under international human rights law. The two areas of law coincide; particularly when considering the role of victims under a hypothetical court for peacekeepers who commit sexual exploitation and abuse, which include human rights violations. It has been generally accepted that victims of crime have a right to reparations, particularly those crimes connected to gross human rights violations, and that reparations should be proportional to the crime/breach committed.[83]

(I) WHAT ARE "REPARATIONS"?

For information about what reparations mean in the context of human rights law, the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Basic Principles 2006) offers detailed insight.[84] The Basic Principles 2006 are intended to reflect international norms regarding the implementation of the right to an effective remedy.[85] Whereas the Basic Principles 1985 focus on victim participation (primarily) during criminal proceedings, the Basic Principles 2006 focus on the right to an effective remedy and reparations, specifically within the context of human rights and humanitarian norms. Although the document itself is not legally binding, the Principles (2006) are still relevant to legal obligations arising from international human rights and humanitarian norms.[86] Overall, the Basic Principles 2006 aim to "identify mechanisms, modalities, procedures and methods" of the right to a remedy.[87]

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[83] *Nairobi Declaration on Women's and Girls' rights to a Remedy and Reparation* (2007) available online: http://www.redress.org [Nairobi Declaration] at [3(E)].
[84] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian* Law GA Res A/RES/60/147 (Annex) (2006) [Basic Principles 2006].
[85] Leyh , above n 2, at 100.
[86] Basic Principles 2006, above n 84, at 2; Manjoo (2010), above n 78, at [15].
[87] Basic Principles 2006 above n 84, at Preamble.

The Basic Principles 2006 note that the duty on states parties to "respect" and "ensure" include undertaking the following active steps; making available remedies which are adequate, prompt and effective;[88] providing victims with "equal and effective" access to justice;[89] and providing "effective remedies".[90] Additionally, victims should have the ability to freely access information regarding their rights relating to reparations and a way to access that information.[91] The Basic Principles 2006 then go on to flesh out possible avenues for an "effective remedy"; these include reparations, rehabilitation and assistance.

There are five accepted forms of "reparations" (that are described under the provisions of the Basic Principles 2006); first, restitution, where the victim is restored to the position they were in before the violation/crime took place.[92] Methods of restitution include restoring human rights, identity or citizenship to the victim(s).[93] For victims of sexual exploitation and abuse, restitution is perhaps not the most appropriate avenue for an effective remedy.[94] It is unlikely that the victim's situation can be restored to a state previous to the harm caused (the sexual abuse) because it is their emotional and physical state that has suffered.

The second form of reparation is financial compensation for the economically measurable harm.[95] Such harm includes physical, moral and emotional.[96] Compensation has been highlighted by several human rights monitoring bodies and will be discussed further below. A third mode of victim reparations is rehabilitation.[97] This includes assistance such as medical or psychological care and legal and social services.[98] Rehabilitation services and

[88] At [2(c)]; see also Bassiouni, above n 9, at 260.
[89] Basic Principles 2006, above n 84, at [3(c)]; see also Bassiouni, above n 9, at 260.
[90] Basic Principles 2006, above n 84, at [3(d)]; see also Bassiouni, above n 9, at 260.
[91] Basic Principles 2006, above n 84, at [11], [12(a)] and [24].
[92] At [19].
[93] At [19].
[94] Manjoo (2010), above n 78, at [31].
[95] Basic Principles 2006, above n 84, at [20].
[96] At [20].
[97] At [21].
[98] At [21].

related assistance to victims has been the direction taken by the International Criminal Court's Trust Fund for Victims and the *United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by UN Staff and Related Personnel*.[99] Moreover, such assistance-focussed remedies are favoured under international human rights norms regarding violence against women and will be discussed further below.

The final two forms of reparations listed by the Basic Principles 2006 are satisfaction and guarantees of non-repetition.[100] Satisfaction includes moral reparations, such as official declarations as to the victim(s) dignity, memorials and public apologies.[101] Guarantees of non-repetition relate to preventative measures, such as endorsing the observance of codes and standards of conduct.[102] In circumstances where restitution and compensation are not appropriate, or do not address the harm, these more moral reparations can often be more important to the victim(s).[103]

(II) WHAT REPARATIONS ARE APPROPRIATE WHEN RESPONDING TO SEXUAL EXPLOITATION AND ABUSE?

As discussed earlier in this thesis, "sexual abuse" includes rape, sexual violence and sexual activity with children. "Sexual exploitation" includes survival sex (where sex is exchanged for assistance to which peacekeepers have access to or which is already owed to the local population). These forms of sexual exploitation and abuse are also violations of human rights norms; acts of sexual abuse would, if the specific requirements are fulfilled, fall under the description of torture, and other cruel, inhuman and degrading treatment (ICCPR,

[99] Discussed more below; *United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by UN Staff and Related Personnel* GA Res A/RES/62/214 (2008).
[100] Basic Principles 2006, above n 84, at [22] and [23].
[101] At [22(b),(d),(e)].
[102] At [23(a),(b),(f)].
[103] Bassiouni, above n 9, at 272.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT))[104] and violence against children (*Convention on the Rights of the Child* (CRC)).[105] Both sexual abuse and sexual exploitation as survival sex would be interpreted as violence against women (ICCPR, Committee on the Elimination of All Forms of Discrimination against Women's *General Recommendation 19*).[106]

Both the ICCPR and CAT have provisions pertaining to a right to an effective remedy for victims.[107] The Human Rights Committee has noted that the right to an effective remedy requires states parties (ICCPR) not only to provide some form of reparations but also to make changes to law and cultural practices which support the occurrence of violations.[108] When developing response mechanisms, the Committee against Torture supports the total participation of victims.[109]

When looking at sexual abuse under the ICCPR and CAT, the corresponding Concluding Observations for states parties reveal the type of reparations required. However, the Committee against Torture has suggested that compensation is not enough for an "effective" remedy, and that states parties should aim for full rehabilitation (or as far as possible).[110] "Rehabilitation" would include services to restore victims' "independence, physical, mental social and vocational ability."[111] Such full rehabilitation is specifically mentioned in many

[104] ICCPR, above n 20; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987): [CAT].
[105] Above n 60.
[106] ICCPR, above n 20; Committee on the Elimination of All forms of Discrimination against Women *General Recommendation 19* CEDAW/C/GC/19 (1992).
[107] ICCPR, art 2; CAT, art 14.
[108] General Comment No 31, above n 81, at [16]-[17].
[109] Committee against Torture *General Comment No 3: Implementation of Article 14 by States Parties* CAT/C/GC/3 (2012) [General Comment No 3] at [4].
[110] General Comment No 3, above n 109, at [5], [9] and [11]; see also Rashida Manjoo *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences* A/HRC/23/49 (2013) at [75].
[111] General Comment No 3, above n 109, at [11]; see also Committee against Torture *Concluding Observations on the third periodic report of Belgium* CAT/C/BEL/CO/3 (2014) at [23]; Committee against Torture *Concluding Observations on the third initial report of Burkina Faso* CAT/C/BFA/CO/1 (2014) at [18].

Concluding Observations.[112] Accordingly, "full rehabilitation" translates into the following measures; firstly, the provision of medical and legal services (both emergency and long-term), including counselling.[113] Psychosocial services should also aim to reintegrate victims back into the community.[114] Additionally, these services should be gender-sensitive providing for the specific needs of sexual abuse victims.[115] Secondly, victims of sexual violence should have access to state protection, such as adequate and safe shelters which should be sufficiently resourced.[116] Thirdly, the needs of vulnerable or marginalised women/girls should be prioritised when developing these rehabilitative services.[117] Fourthly, states parties should work on sensitising societies to sexual abuse and take steps to raise awareness of the negative impacts of such violence on women/girls and their communities.[118] Moreover, it is expected that adequate funding is put aside for these reparation measures.[119]

[112] See for example Committee against Torture *Concluding Observations on the combined fifth and sixth reports of Portugal* CAT/C/PRT/CO/5-6 (2013) at [16]; Committee against Torture *Concluding Observations on the combined third to fifth periodic reports of Latvia* CAT/C/LVA/Co/3-5 (2013) at [22]; Human Rights Committee *Concluding Observations on the fifth periodic report of Peru adopted at its 107th Session* CCPR/C/PER/CO/5 (2013) at [12]; Human Rights Committee *Concluding Observations on the Seventh periodic report of Ukraine* CCPR/C/UKR/CO/7 (2013) at [6].

[113] See for example, Committee against Torture *Concluding Observations on the third initial report of Burkina Faso,* above n 111, at [18]; Committee against Torture *Concluding Observations on the combined fifth and sixth periodic reports of Poland* CAT/C/POL/CO/5-6 (2013) at [22(e)]; Human Rights Committee *Concluding Observations on the initial report of Sierra Leone* CCPR/C/SLE/CO/1 (2014) at [15].

[114] See for example, *Concluding Observations on the third periodic report of Belgium*, above n 111, at [23].

[115] See for example, Committee against Torture *Concluding Observations on the combined fifth and sixth periodic reports of Guatemala* CAT/C/GTM/CO/5-6 (2013) at [12].

[116] See for example, *Concluding Observations on the combined fifth and sixth periodic reports of Poland*, above n 113, at [22(e)]; *Concluding Observations on the combined fifth and sixth periodic reports of Guatemala*, above n 115, at [13(c)]; *Concluding Observations on the initial report of Sierra Leone*, above n 113, at [8].

[117] See for example, Human Rights Committee *Concluding Observations on the sixth periodic report of Germany* CCPR/CDEU/Co/6 (2012) at [9].

[118] See for example, *Concluding Observations on the initial report of Sierra Leone*, above n 113, at [15]; Human Rights Committee *Concluding Observations on the initial report of Indonesia* CCPR/C/IDN/CO/1 (2013) at [13]; Human Rights Committee *Concluding Observations adopted by the Human Rights Committee at its 105th session, 9-27 July 2012 Maldives* CCPR/C/MDV/CO/1 (2012) at [11].

[119] See for example, *Concluding Observations on the fifth periodic report of Peru*, above n 112, at [10].

Similar measures are expected from states when responding to violence against children.[120] Under the Convention on the Rights of the Child, states parties are required to provide an effective remedy.[121] According to the Committee on the Rights of the Child, an "effective" remedy will focus on compensation and rehabilitation.[122] States parties are required to implement victim services, such as psycho-social and health, and provide protection such as shelters.[123] In addition, the Committee has also noted that states should tackle the issue of sexual violence against children through a holistic strategy that takes into account the gender element.[124]

International instruments and human rights norms surrounding violence against women also have similar expectation from states regarding the response to victims. The Platform for Action 1995 provides that states should implement preventative measures and provide access to effective remedies to victims, these include "compensation and indemnification and healing of victims".[125] Article 4(d) of the *UN Declaration on the Elimination of Violence against Women* (DEVAW)[126] indicates a number of steps are expected from states when responding to violence against women; such as, providing victims with access to justice, effective remedies, and access to information about their rights and mechanisms available

[120] See for example, Human Rights Committee *concluding Observations on the fourth periodic report of Ireland* CCPR/C/IRL/CO/4 (2014) at [10].
[121] CRC, art 14.
[122] See for example, Committee on the Rights of the Child *Concluding Observations on the combined third to fifth reports of the periodic reports of the Bolivarian Republic of Venezuela* CRC/C/VEN/CO/3-5 (2014) at [43(b)]; Committee on the Rights of the Child *Concluding Observations on the combined fourth and fifth periodic reports of the Russian Federation* CRC/C/RUS/CO/4-5 (2014) at [36].
[123] See for example, Committee on the Rights of the Child *Concluding Observations on the combined third and fourth periodic report of Portugal* CRC/C/PRT/CO/3-4 (2014) at [36(c)-(d)]; Committee on the Rights of the Child *Concluding Observations on the combined second to fourth periodic report of the Congo* CRC/C/COG/CO/2-4 (2014) at [43(b)]; Committee of the Rights of the Child *Concluding Observations on the combined third and fourth periodic reports of Croatia* CRC/C/HRV/CO/3-4 (2014) at [37(f)].
[124] See for example, *Concluding Observations on the combined third to fifth periodic reports of the Bolivarian Republic of Venezuela*, above n 122, at [45(b)].
[125] *Beijing Declaration and Platform for Action*, above n 13, at [124(d)].
[126] *United Nations Declaration on the Elimination of Violence against Women* GA Res A/RES/48/104 (1994).

to address the harm caused.[127] Although the *Convention on the Elimination of All Forms of Discrimination against Women*[128] does not mention victims in its provisions (or indeed violence against women) the monitoring body has illustrated corresponding rights and obligations relating to victims in its General Recommendations.[129]

In addition to describing the various forms of reparations, the Committee on the Elimination of Discrimination against Women describes remedies as "affordable, accessible and timely".[130] Specifically, it has also been noted by the Committee that states parties should implement and resource victim support services.[131] This includes rehabilitative programmes with specialised personnel to deal with the psychological needs of victims of gendered violence.[132] Looking at the jurisprudence of the Committee and its Concluding Observations rehabilitative services are often favoured over compensation as a form of reparation, much like those preferred by the Human Rights Committee and the Committee against Torture.[133] Rehabilitative services include those related to legal representation, psychosocial support, and medical treatment.[134] Moreover, states parties are expected to implement protective

[127] See also regional examples such as the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women [Convention of Belém do Pará,]* (opened for signature 6 September 1994, entered into force 3 May 1995) arts 7(f) and 7(g); *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women* (opened for signature 11 July 2003, entered into force 25 November 2005) arts 4 and 10.
[128] *Convention on the Elimination of All Forms of Discrimination against Women* 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981).
[129] *Recommendation 19*, above n 106.
[130] *Committee on the Elimination of All forms of Discrimination against Women General Recommendation 28* CEDAW/C/GC/28 (2010) at [34].
[131] *General Recommendation 19*, above n 106, at [24(k)].
[132] At [24(k)].
[133] Manjoo (2010), above n 78, at [14].
[134] See for example, Committee on the Elimination of Discrimination against Women *Hakan Goekce, Handan Goekce and Guelue Goekce v Austria* CEDAW/C/39/D/5/2005 Communication No 5/2005 (2007) at [12.1.1]; Committee on the Elimination of Discrimination against Women *S V P v Bulgaria* CEDAW/C/53/D/31/2011 Communication No 31/2011 (2012) at [9.11]; Committee on the Elimination of Discrimination against Women *Concluding Observations on the combined initial and second to fifth reports of the Central African Republic* CEDAW/C/CAF/CO/1-5 (2014) at [28(b)]; Committee on the Elimination of Discrimination against Women *Concluding Observations on the combined fourth and fifth periodic reports of Cameroon* CEDAW/C/CMR/CO/4-5 (2014) at [19(e)]; Committee on the Discrimination of Women, *Concluding Observations on Cote d'Ivoire* CEDAW/C/CIV/CO/1-3 (2011) at [29(c)-(e)].

measures such as shelters for victims of gendered violence with particular reference to vulnerable or marginalised groups of women and girls.[135]

Besides those remedies associated with prevention and immediate assistance and accountability, the Special Rapporteur on Violence against Women has argued that reparations should serve additional societal goals.[136] Moreover, remedies should link to both individual and structural "transformation".[137] Essentially, violence against women exists within a context of negative gender stereotypes and inequalities, and structural oppression over women and girls.[138] Arguably, sexual exploitation and abuse is an example of this harmful structural gender hierarchy. Any gender inequalities and discrimination against women that exists is then compounded by any post-conflict or post-disaster context and the typical hyper-masculinity systemic within military forces.[139] Therefore, reparations should not reinforce structural gender inequalities. In fact, the Special Rapporteur argued that remedies should aim to dismantle such negative structures and address the "root causes of violence … women experience before, during and after conflict."[140] Similarly, the Committee on the Elimination of Discrimination against Women has urged states parties to CEDAW to develop comprehensive strategies when responding to violence against women to tackle the wider societal context that fosters gendered violence.[141]

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[135] See for example, *Hakan Goekce, Handan Goekce and Guelue Goekce v Austria*, above n 134, at [12.1.2]; Committee on the Elimination of Discrimination against Women *V K v Bulgaria* CEDAW/C/49/D/20/2008 Communication No 20/2008 (2011) at [9.13]; Committee on the Elimination of Discrimination against Women *Concluding Observations on the combined fourth and fifth periodic reports of Georgia* CEDAW/C/GEO/CO/4-5 (2014) at [21(c)]; Committee on the Elimination of Discrimination against Women *Concluding Observations on the sixth periodic report of Sierra Leone* CEDAW/C/SLE/CO/6 (2014) at [21(f)]; *Concluding Observations on Cote d'Ivoire*, above n 134, at [29(f)]; See also Committee on the Elimination of Discrimination against Women *A T v Hungary* A/60/38 (Part 1) Communication No 2/2003 (2005) Annex III.
[136] Manjoo (2010), above n 78, at [12].
[137] At [24]; see also Manjoo (2013), above n 110, at [71].
[138] Manjoo (2013), above n 110, at [31].
[139] See Chapter 2: Concepts of sexual exploitation and abuse for further discussion on the link between harmful masculinities within military culture and sexual exploitation.
[140] Manjoo (2013), above n 110, at [31].
[141] See for example, Committee on the Elimination of Discrimination against Women *Banu Akbak, Gulen Khan, and Melissa Ozdemir v Austria* CEDAW/C/39/D/6/2005 Commination No 5/2005 (2007) at [12.2] and

In responding to sexual exploitation and abuse by military personnel, it would seem that overall victims should be afforded effective remedies. For remedies to be "effective" they should include compensation (perhaps) and rehabilitation specifically.[142] Rehabilitative services should be comprised of immediate or emergency support (such as medical, psychosocial, provision of shelters). Moreover, legal services would also need to be made available, particularly if there was going to be a hybrid court for peacekeepers. Additionally, reparations should have long-term societal or "transformative" goals. Thus, when responding to sexual exploitation and abuse by peacekeepers, states or the United Nations would need to take leadership and implement forward-thinking strategies aimed at dismantling harmful social structures or cultural practices that manifest gendered violence. In the context of peacekeeping, this may mean further sensitising personnel to sexual exploitation and abuse and breaking down harmful masculinities that can exist within military forces. Moreover, UN partnering with local (host state) networks that provide emergency and long-term support for victims should be prioritised (in order to link with the principle of host state ownership and a policy of inclusivity).

A failure by a state to exercise criminal jurisdiction over their military contingent members for sexual exploitation and abuse not only breaches the obligation to prosecute but also to provide the victim with an effective remedy.[143] The consequences of state responsibility

[12.3(b)-(c)]; Committee on the Elimination of Discrimination against Women *Cecilia Kell v Canada* CEDAW/C/51/D/19/2008 Communication No 19/2008 (2012) at [10.2] and [11(b)(i)]; *Hakan Goekce, Handan Goekce and Guelue Goekce v Austria*, above n 134, at [12.2]; Committee on the Elimination of Discrimination against Women *Isatou Jallow v Bulgaria* CEDAW/C/52/D/32/2011 Communication No 32/2011 (2012) at [8.6]; Committee on the Elimination of Discrimination against Women *Maria de Lourdes da Silva Pimentel v Brazil* CEDAW/C/49/D/17/2008 Communication No 17/2008 (2011) at [7.7]; *S V P v Bulgaria*, above n 134, at [9.10]; Committee on the Elimination of Discrimination against Women *Concluding Observations on the combined fourth and fifth periodic reports of India* CEDAW/C/IND/CO/4-5 (2014) at [11(b)]; Committee on the Elimination of Discrimination against Women *Concluding Observations on the combined seventh and eighth periodic reports of Peru* CEDAW/C/PER/CO/7-8 (2014) at [18]; *Observations on the combined sixth and seventh periodic reports of the Democratic Republic of the Congo*, above n 123, at [10ff].

[142] Compensation to be looked at more below.

[143] *General Recommendation 19*, above n 106, at art 24(i) and 24(iii); Bassiouni, above n 9, at 264.

were discussed in Chapter Five. However, it may be that the UN should have the responsibility to implement such comprehensive reparation schemes (particularly if coupled with a hybrid court for peacekeepers, as it follows the UN leadership principle). Moreover, the UN has already taken steps to implement victim support with the *United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by UN Staff and Related Personnel.*[144]

There are parallels between the ideas of "transformative justice" underlying the ICC Trust Fund and principles advocated by the Special Rapporteur on Violence against Women in regard to responding to victims of such gendered violence. As the ICC Trust Fund is one of the few examples of an organ of an international criminal institution, it is necessary to investigate how the Fund works and whether it is comparable to the UN Strategy.

(C) Reparations and international criminal justice: ICC Trust Fund for Victims

The International Criminal Court has the power to order cost of reparations against a convicted person (in the form of restitution, compensation or rehabilitation).[145] However, where the convicted person is unlikely to deliver on costs or it is deemed appropriate by the Court, the ICC may order reparations be made through the Trust Fund for Victims.[146] The Trust Fund may be utilised in various ways; reparations may be awarded directly to the victim, collective reparations may be awarded, or general assistance may be made available to inter-governmental, international or national organisations previously approved by the Trust Fund.[147] Additionally, the Trust Fund is an independent organ of the Court itself, and

[144] Discussed more below.
[145] Rome Statute, art 75(2); Rules of Procedure and Evidence, above n 47, at Rule 98(3).
[146] Rome Statute, art 75(2); Rules of Procedure and Evidence, above n 47, at Rule 98(3).
[147] Rules of Procedure and Evidence, above n 47, at Rule 98(2), 98(3) and 98(4).

so may provide assistance to victims and their communities on its own accord (within an active situation of the Court and not inconsistent with the rights of any accused).[148] The Fund may also consider the views of victims and their families when fulfilling its role.[149]

In its first order for reparations to date (March 2015), the International Criminal Court fleshed out its general principles relating to reparations.[150] The Appeals Chamber noted that reparations must be ordered and implemented with full consultation with victims and their communities.[151] Reparations (whether restitution, compensatory, rehabilitative, or symbolic) must be prompt, appropriate, and proportional to the harm caused to the victim and their communities.[152] Additionally, reparations aimed at community programmes should "reflect local cultural and customary practices unless these are discriminatory, exclusive or deny victims equal access to their rights".[153] In the particular case of *Prosecutor v Lubanga Dyilo*, all modalities of reparations were made against Lubanga (convicted for *inter alia* the recruitment of child soldiers).[154] For example, the Court ordered reparation in the form of rehabilitation measures; to reintegrate former child soldiers back into their society, to address their shame and victimisation, and to include education programmes implemented

[148] International Criminal Court *Regulations of the Trust Fund for Victims* ICC-ASP/4/Res.3 (2005) at [50(a)(i)]; See also, Evans, above n 40, at 106.
[149] *Regulations of the Trust Fund for Victims* above n 147, at [49].
[150] *Prosecutor v Lubanga Dyilo (Situation in the Democratic Republic of Congo) Annex A: Principles of Reparations* ICC Appeals Chamber ICC-01/04-01/06-3129 3 March 2015: [ICC Reparation Principles]; *Prosecutor v Lubanga Dyilo (Situation in the Democratic Republic of Congo) Submission on reparations issue* ICC Trial Chamber I ICC-01/04-01/06-2879, 10 May 2012 at [4].
[151] ICC Reparation Principles, above n 150, at [29]-[32].
[152] At [44]-[45].
[153] At [47].
[154] *Prosecutor v Lubanga Dyilo (Situation in the Democratic Republic of Congo) Annex A: Order for Reparations against Mr Lubanga* ICC Appeals Chamber ICC-01/04-01/06-3129, 3 March 2015: [Order for Reparations].

within the victims' community.[155] The Trust Fund for Victims has been ordered to implement the reparation order.[156]

Through its regulations, the Trust Fund has a mandate to partner with NGOs, international and national organisations to help provide assistance to victims and their communities in countries where the ICC investigates (situations).[157] The Trust Fund for Victims takes a holistic view when providing assistance measures and projects. When deciding on such projects, the Trust Fund's board of directors[158] will consider the wider context (for example, conflict, post-conflict, post-disaster, human rights crimes) and take into consideration a number of factors when developing responses. Such factors include, transitional justice, gender mainstreaming, the physical, mental and social wellbeing of victims, economic security, material support (food and shelter), and wider peace and reconciliation of victim communities.[159] Examples of current Trust Fund programmes (partnered with the appropriate international and national organisations) include employment skills training, financial literacy education and groups dedicated to assisting survivors of sexual violence with reintegration.[160] Moreover, local outreach programmes to reduce stigmatisation of sexual violence has also been a key aspect of the Trust Fund's work.[161] The focus of such

[155] Order for Reparations, above n 154, at [67(iii)]-[67(v)].
[156] At [68]-[70] and [73]-[74]; a draft implementation plan of these reparations is currently being worked on by the Trust Fund for Victims see "TFV Board of Directors meets to discuss Lubanga reparations plan" (press release, 27 July 2015) available online <www.icc-cpi.int>.
[157] *Regulations of the Trust Fund for Victims*, above n 148, at [50].
[158] The Trust Fund's board of directors are made up of five members, representing the five major world regions (currently, Asia, Africa, Americas and Caribbean states, Eastern European states, and Western European and "other" states) see J McCleary-Sills and S Mukasa *External Evaluation of the Trust Fund for Victims Programmes in northern Uganda and the Democratic Republic of Congo: Towards a Perspective for Upcoming Interventions* (International Center for Research on Women, The Hague, 2013) at 10.
[159] See generally The Trust Fund for Victims "A Road to Recovery: Healing Empowerment and Reconciliation" *Programme Progress Report* (Winter, 2014); The Trust Fund for Victims *TFV Strategic Plan 2014-2017* (The Hague, 2014).
[160] "A Road to Recovery: Healing Empowerment and Reconciliation" above n at 5; see for example, "The Trust Fund for Victims Launches New Assistance Projects in Northern Uganda" (press release, 3 July 2015) available online <www.icc-cpi.int>.
[161] Assembly of State Parties *Resolution on Victims and affected Communities, Reparations and Trust Fund for Victims* ICC-ASP/13/Res.4 (2014) at 8; *TFV Strategic Plan 2014-2017*, above n 159, at 20-21.

programmes is community leadership and participation, which has been highlighted as one of key aspects of the perceived success of the Trust Fund.[162]

In terms of response to gendered violence, the Trust Fund's measures have emphasised the empowerment of women and girls. Such measures include financial literacy for financial independence and community leadership.[163] Therefore, the development of programmes and assistance seek to involve the full participation of local women and girls.[164] This can help dismantle gendered stereotypes which foster violence against women, and provide a more complete perspective for implementation strategies.[165] The ICC Trust Fund itself places its reparations programmes within the structure of "gender justice"; therefore, remedies that aim to acknowledge the context of unequal power dynamics based on gender and to avoid magnifying such inequalities.[166]

The ICC Trust Fund's approach has both expanded and challenged the traditional concept of reparations for victims with its focus on rehabilitation (which have often been limited to restitution and compensation).[167] The Trust Fund's notion of "transformative" justice has been drawn from several sources, particularly from human rights norms. As discussed above, the approach to victim reparations taken by the Special Rapporteur on Violence against Women has been with particular emphasis on long-term remedies and includes those aimed at changing negative social/economic/cultural structures that foster gendered violence. The Inter-American Court of Human Rights has also had some influence on the Trust Fund. In 2009, the Court held that to be effective remedies should be awarded in light

[162] McCleary and Mukasa, above n 158, at 8.
[163] At 34.
[164] "A Road to Recovery: Healing Empowerment and Reconciliation" above n 160, at 4; *TFV Strategic Plan 2014-2017,* above n 159, at 20-21; *Resolution on Victims and affected Communities, Reparations and Trust Fund for Victims,* above n 161, at 8; McCleary and Mukasa, above n 158, at 13.
[165] McCleary and Mukasa, above n 158, at 34.
[166] E Rehn "Speech: Achieving Gender Justice: The Case of Reparations" *57th Session of the Commission on the Status of Women* (2013) at 3.
[167] Hoyle and Ullrich, above n 9, at 13.

of the context of "structural discrimination" and that reparations should be aimed at changing the situation.[168]

Additionally, the ICC Trust Fund is influenced by the *Nairobi Declaration on Women's and Girls' rights to a Remedy and Reparation*.[169] The Declaration arose out of a meeting between women's rights organisations and survivors of war-time sexual violence from Asia, Europe, South and North America, and Africa.[170] Primarily the instrument concerns implementation of the right to an effective remedy in the context of sexual violence during armed conflict. The Declaration is meant to reflect existing norms in relation to effective remedies, specifically within the context of armed conflict impacts on women and girls.

The Nairobi Declaration acknowledges that states have an obligation to provide a remedy for victims, but goes further to suggest that this is a responsibility for the international community to share.[171] The Declaration's Preamble notes the wider context of negative gender stereotypes and the detrimental impacts of discrimination rooted in culture and religion on women and girls during and post conflict.[172] Such negative impacts are magnified once sexual exploitation or abuse has been committed. The Declaration also supports transformative reparations:[173]

> … reparation must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls that reintegration and restitution by themselves are not sufficient goals of reparation, since

[168] *Case of Gonzales et al ("Cotton Field") v Mexico* (2009) Inter-American Court of Human Rights (Ser C) No 205at [450].
[169] Nairobi Declaration, above n 83*;* Noted by Chambers in *Prosecutor v Lubanga Dyilo (Decision Establishing the Principles and Procedures to be Applied to Reparations)* ICC Trial Chamber ICC-01/04-01/06-2904, 2012 at [185], [192] and [209].
[170] Nairobi Declaration above n 83.
[171] At [6].
[172] At Preamble; see also generally V Couillard "The Nairobi Declaration: Redefining Reparations for Women Victims of Sexual Violence" (2007) 1 *The International Journal of transitional Justice* 444.
[173] Nairobi Declaration, above n 83, at Declaration 3.

> the origins of violations of women's and girls' human rights predate the conflict resolution.

Moreover, the Declaration notes that "political and structural inequalities" that harm women and girls should also be incorporated in reparations.[174] Not only should the context be taken into account when deciding reparations, but also the harmful long-term consequences of gender-based crimes on victims and their communities.[175] Victims themselves should be involved in every stage of the reparations process, both in its development and implementation.[176] This not only supports the principle of host state ownership but also supports women and girls' empowerment and participation during a rebuilding stage post-conflict generally.[177]

Overall, the ICC Trust Fund for Victims focuses on transformative and forward-looking reparations. This goes further than just immediate or emergency care for victims. The Trust Fund takes a holistic view of human rights violations, victims and their communities to tackle the wider context that fosters such violations. In relation to sexual violence, this view is similar to that under international human rights norms which support reparations that have transformative goals. Remedies that are rehabilitative and forward-thinking can help dismantle cultural or societal structures that foster gendered violence. Moreover, this trend places host state ownership and victim empowerment at its core. These policies and strategies align with the principle of host state ownership and are inclusive of victims and their communities. The Trust favours working with local organisations and communities which legitimises its reparations and its transformative goals.

[174] At [3(h)].
[175] At [3(e)].
[176] At [2(A),(B)].
[177] At [1(D)].

(D) VICTIMS OF SEXUAL EXPLOITATION AND ABUSE: STATUS QUO

Certain parallels can be made between the ICC Trust Fund and the UN Strategy on victims of sexual exploitation and abuse. However, the current direction of the UN Strategy and its lack of full implementation mean that the UN response has fallen short of the kind of reparations and assistance expected under international human rights norms as described above. Arguably, more needs to be done to adequately address victims' needs.

The 2005 *Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations* (Zeid Report) highlighted the need for the UN to look at providing victim assistance.[178] However, the report also noted that (at that stage) the organisation did not have the mandate to provide full victim support, and instead favoured emergency medical assistance and referrals to local networks to provide comprehensive care.[179] Nevertheless, since 2005 the approach from the UN has been to look at implementing a wide-ranging approach to provide victim assistance.

Building on the Zeid Report, the *United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by UN Staff and Related Personnel* purports to introduce "bold measures" to respond to victims.[180] When the draft UN Strategy was submitted for discussion in 2006, Kofi Annan asserted that a "truly comprehensive approach will leave no uncertainty for the victims and will restore the reputation of the Organization [UN] as one that acts responsibly towards the communities it serves."[181]

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[178] Secretary-General *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations* GA A/59/710 (2005) [Zeid Report] at [52].
[179] At [53]-[56].
[180] Kofi Annan *Comprehensive Review of the Whole Question of Peacekeeping Operations in all their Aspects* Letter dated 25 May 2006 from the Secretary-General to the President of the General Assembly GA A/60/877 (2006) at 2.
[181] At 2.

The 2006 draft policy noted that there has been no previous coherent system for victim support, and the UN Strategy is an attempt to fill that gap with a "system-wide comprehensive approach to victim assistance".[182] The individual responsibility of perpetrators is not however circumvented by the UN Strategy.[183] Instead, the UN's role is to coordinate response to the individual needs of victims, working with local organisations which provide such support.[184]

The UN Strategy highlights the importance of working within local (host state) organisations and networks which already provide emergency or immediate medical/psychological/legal support.[185] The response to sexual exploitation and abuse may be different depending on the particular host state and the cultural/social context.[186] Local community ownership over assistance and support of victims also helps with legitimacy.[187] Working with local networks is important not only for host state ownership, but also to avoid alienating or discriminating against victims of gendered violence generally.[188] Therefore, the UN's position under the Strategy is to facilitate victim support through such networks, and to offer help in the creation of assistance mechanisms if gaps exist.[189] It has since been confirmed that this does not mean the UN will fully fund the establishment of new victim support networks, but will provide proportionate funding whilst working with local organisations.[190] It was envisioned

[182] Kofi Annan *Comprehensive Review of the Whole Question of Peacekeeping Operations in all their Aspects* Letter dated 25 May 2006 from the Secretary-General to the President of the General Assembly GA A/60/877 (2006) Annex: A "Draft United Nations Policy Statement on Assistance and Support to victims of Sexual Exploitation and Abuse by UN Staff or Related Personnel" [2006 Draft Policy] at [4]-[5].
[183] *United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel* GA Res A/RES/62/214 (2008) [2008 UN Strategy] Annex at [3].
[184] At [2] and [11].
[185] At [10].
[186] Schabas, above n 35, at 541.
[187] At 543.
[188] 2006 Draft Policy, above n 182, at [9]; 2008 UN Strategy, above n 183, at [9].
[189] 2008 UN Strategy, above n 183, at [10].
[190] ECHA/ECPS UN and NGO Task Force on Protection from Sexual Exploitation and Abuse *Sexual Exploitation and Abuse Victim Assistance Guide: Establishing Country-Based Mechanisms or Assisting Victims of Sexual Exploitation and Abuse by UN/NGO/IGO Staff and Related Personnel* (April, 2009): [Victim Assistance Guide] at 9.

that the UN will facilitate referrals between service providers using "Victim Support Facilitators" (individual roles).[191]

Services for assistance should be implemented through a "victim-orientated" approach.[192] There are three categories for recipients of assistance under the UN Strategy; "complainants", "victims" and "children born as a result of sexual exploitation and abuse".[193] The different categories reflect different stages of inquiry and corresponding forms of support. Complainants represent individuals who have alleged they have been sexually exploited or abused, whose complaint has not yet been verified by an administrative process (either UN or Troop-Contributing Country).[194] Under the UN Strategy, complainants are entitled to emergency or immediate care, including medical, psychological, social, and legal assistance and protection, such as shelter.[195]

"Victims" under the UN Strategy are individuals whose claim has been verified (or the category seems appropriate) by an administrative, civil or criminal process.[196] Victims are entitled to additional support, depending on individual needs.[197] However, the 2006 draft Strategy had referred to forward-looking support for victims; such as continued education, vocational skills training and assistance with the goal of reintegration back into the community.[198] This reference was excluded in the final version of the UN Strategy adopted in 2008. The final Strategy fails to acknowledge the reparative type of support which would

[191] 2008 UN Strategy, above n 183, at [12].
[192] Victim Assistance Guide, above n 190, at 5.
[193] 2008 UN Strategy, above n 183, at [5(c)], [5(d)] and [5(e)].
[194] At [5(c)].
[195] At [6].
[196] At [5(d)].
[197] At [7].
[198] Kofi Annan *Comprehensive Review of the Whole Question of Peacekeeping Operations in all their Aspects* Letter dated 25 May 2006 from the Secretary-General to the President of the General Assembly GA A/60/877 (2006) Annex: B "Draft United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff or Related Personnel" [2006 Draft Strategy] at [20].

align with reparations under international human rights norms associated with violence against women.

Children born from sexual exploitation and abuse are also entitled to basic assistance (medical, psychological, social, and shelter) under the 2008 UN Stratgey.[199] Moreover, the UN is committed to working with member states to facilitate the pursuit of child support and paternity claims.[200] In the 2006 draft, there was an explicit link made between UN support and international human rights law involving the rights of children. Articles 7 and 27 of the *Convention on the Rights of the Child* are specifically referenced in the draft, where states parties are required to take all measures to ensure children know and are cared for by their parents, and that maintenance for the child are recovered.[201] The 2008 Strategy thus builds on these rights and obligations by facilitating paternity and child support claims.[202]

In terms of implementation of the UN Strategy, progress has been slow. According to the Secretary-General, implementation should begin in two "phases"; the first is to map local networks in countries in which the UN operates; the second is to develop these services further, establish firm partnerships and take note of "lessons learned".[203] Currently, implementation is in its first phase. Information regarding the mapping of services has been sporadic; in 2009, there appeared to be a disparity between implementation progressions across host states. In the Democratic Republic of Congo for instance, a number of steps have been taken including the identification of pre-existing legal, medical and psychosocial care services, the hiring of an individual with the role of "network coordinator" and the

[199] 2008 UN Strategy, above n 183, at [8].
[200] At [8].
[201] 2006 Draft Strategy, above n 198, at [24].
[202] At [25]-[27].
[203] Report of the Secretary-General *Implementation of the United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel* GA A/64/176 (2009) at [14] and [20].

designation of focal points for implementation of the UN Strategy.[204] However, in Timor-Leste there was a complete lack of a formal network identified or established for responding to victims of sexual exploitation and abuse (with no explanation as to this absence).[205] Notably, the Secretary-General's report indicated that the concept of sexual exploitation and abuse was not understood in many host state communities, which would make it difficult for victims to come forward for assistance and support in the first instance.[206]

In 2012, some implementation progress was noted by the Conduct and Discipline Unit. Out of only five missions which conducted mapping of basic services for victims, three had some form of assistance described under the UN Strategy for the three categories of complainants, victims and children born from sexual exploitation and abuse. Those three missions were the UN Mission in Liberia, the UN Stabilization Mission in Haiti and the UN Organization Stabilization Mission in the Democratic Republic of the Congo.[207] Overall, more information is needed to develop a clear understanding of the services available and further develop. The information currently available appears to suggest that more needs to be done to establish consistency across host states in terms of what kinds of support services are available (and are proportionate to the need of victims). Currently, there is no system-wide implementation of the UN Strategy as intended. This was made clear in the Secretary-General's 2015 annual report, which notes that the failure of implementation has been due to a lack of resources.[208]

[204] At [28].
[205] At [44].
[206] At [67].
[207] Report of the Secretary-General *Overview of the Financing of the United Nations Peacekeeping Operations: Budget Performance for the Period from 1 July 2010 to 30 June 2011and Budget for the Period 1 July 2012 to 30 June 2013* GA A/66/679 (2010) at [129]
[208] Secretary-General *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* GA A/69/779 (2015) at [68].

Currently, the response to victims depends on the level of support offered by organisations in the host state. Although the Memorandum of Understanding (agreement between the troop-contributing country and the UN) has detailed provisions relating to the criminal accountability of military personnel for sexual exploitation and abuse, it makes limited mention of accountability to victims. Article 7 *sexiens* notes that the TCC and the UN should cooperate in matters regarding paternity claims involving military contingent members (involving sexual exploitation and abuse or otherwise).[209] Until the UN Strategy is fully implemented, basic material care is required from the UN and its partners.[210] Such care includes referrals to local safe houses, medical care, counselling services, and legal support organisations.[211] Such referral systems are the likely recourse that victims have outside of the current complaint mechanism which initiates investigation and (hopefully) prosecution.

In the 2015 annual report on sexual exploitation and abuse, the Secretary-General, noting the lack of implementation of the UN Strategy, highlighted the need for a common funding mechanism.[212] The Secretary-General reiterated that it is not the intention of the funding mechanism to provide compensation to victims, rather to help fund awareness raising, community outreach campaigns, and provide support and assistance to complainants, victims and children born from sexual exploitation and abuse generally.[213] Although it is noted that best practice supports implementation of the UN Strategy through local organisations and networks, the lack of funding (from the UN) has meant that this has not been the case.[214] Therefore, it is unclear whether the establishment of a new funding

[209] *Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual)* GA A/c.5/66/8 (2011) ch. 9 Memorandum of Understanding: [2007 MOU].
[210] *Implementation of the United Nations Comprehensive Strategy on Assistance,* above n 203, at [3].
[211] Report of the Secretary-General *Special Measures for Protection from Sexual Exploitation and Abuse* GA A/66/699 (2012) at [29].
[212] *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* (2015), above n 208, at [65]-[66].
[213] At [65]-[66].
[214] At [68].

mechanism will allow the UN to have more of a direct role in providing services to victims or whether it will likely fund permanent positions in the field as "focal points" for the prevention of sexual exploitation and abuse.[215] The proposed trust fund for victims has since been preliminarily adopted by the UN and is to be implemented sometime in 2016.[216] It remains to be seen whether the funding system will help or hinder the implementation of the UN Strategy.

(I) CHILDREN BORN AS A RESULT OF SEXUAL EXPLOITATION AND ABUSE

Children fathered through acts of sexual exploitation and abuse is a relatively under-researched issue.[217] Also known as "peacekeeper babies", children born from sexual liaisons between local women and peacekeepers can also be a result of consensual relationships, however fathers may have been redeployed or otherwise disappeared.[218] The consequences for women and girls left with children from such relationships (and sexual exploitation and abuse) can be harmful; for example, in communities where unmarried women with children are ostracised or stigmatised it is more difficult to seek out opportunities for employment or assistance.[219] Before the UN Strategy, the abandonment of such mothers and their children by peacekeepers (from consensual relationships or otherwise) was seen by UN officials as "exploitative" conduct.[220] Although the Strategy now makes the distinction with the specific category "children born as a result of sexual exploitation and abuse" (thus, ruling out explicit

[215] At [68].
[216] UN Conduct and Discipline Unit "Fact Sheet on Sexual Exploitation and Abuse" (3 September 2015) <http://cdu.unlb.org>.
[217] O Simic and M O'Brien "'Peacekeeper Babies': An Unintended Legacy of United Nations Peace Support Operations" (2014) 15 *International Peacekeeping* 345 at 348.
[218] See for example the case of Marko Susnja, whose (consensual) marriage with a peacekeeper failed and she sought help from the UN to facilitate child support payments from her former husband, Simic and O'Brien, above n 217, at 349.
[219] C Morris, "Peacekeeping and the Sexual Exploitation of Women and Girls in Post-Conflict Societies: A Serious Enigma to Establishing the Rule of Law" (2010) 14 *Journal of International Peacekeeping* 184 at 191.
[220] See for example, Zeid Report, above n 178, at [10]; Report of the Office of Internal Oversight Services *Peacekeeping Operations: Report of the Office of Internal Oversight Services* GA A/65/275 (Part II) (2011) at [47].

assistance for those children born out of consensual relationships), the annual reports from the Secretary-General suggest that the UN will facilitate paternity and child support claims regardless.[221]

The distortion of the two seemingly distinct contexts of "peacekeeping babies" (those born as a result of sexual exploitation and those born as a result of a consensual sexual relationship) can be a reflection of the "women-as-victims" rhetoric that the UN has taken up when conceptualising sexual exploitation and abuse.[222] The perception that all local women and girls are "inherently vulnerable" has the potential to fuel further discrimination against women, rather than help dismantle such structural inequalities.[223] Arguably, the ambiguity in such conceptualisation makes it difficult to adequately provide effective remedies to mothers. The position of children born out of sexual exploitation and abuse in regards to receiving remedies is even less coherent.

Arguably, "peacekeeping babies" are a unique category of "victims" under human rights legal theory. A comparison could be made with "war babies"; where children are born out of sexual abuse committed during armed conflict. While such children are often in need of specific assistance as they can suffer stigmatisation of being born out of rape, there is relative silence regarding response to their needs.[224] As such, reparations for children born of wartime rape are ambiguous and therefore cannot be compared to those expected in response to children fathered by peacekeepers by acts of sexual exploitation and abuse. Moreover, due to the lack of a wider context in human rights law in which to draw from, apart from

[221] See for example, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* (2015), above n 208, at [69]-[72].
[222] Simic and O'Brien, above n 217, at 350; see also Chapter Two: Concepts.
[223] Simic and O'Brien, above n 217, at 350.
[224] A M S Watson "Children Born of Wartime Rape: Rights and Reparations" (2007) 9 *International Feminist Journal of Politics* 20, at 27.

very general rights under the Convention on the Rights of the Child, the UN cannot be expected to respond in a particular way.[225]

Regardless of the lack of guidance from human rights norms, the UN has in the past suggested assistance to children born from sexual exploitation and abuse beyond just facilitating paternity and child support claims. For example, the draft Strategy included provisions on basic assistance for such children (medical, psychosocial, and legal) and in "exceptional cases" financial assistance.[226] However, these provisions were dropped in the adopted version and there appears to be little interest by the UN to implement such assistance mechanisms in the future.

(II) SUMMARY OF THE STATUS QUO

The current arrangements find certain parallels with the ICC Trust Fund, particularly with the UN Strategy's focus on working with existing local organisations in providing assistance and support to victims. However, transformative or forward-thinking support mechanisms are missing from the current Strategy. Mechanisms such as skills training or further education would support full rehabilitation or reintegration of victims back into the community. Although compensation has been mentioned as appropriate reparations by some international human right bodies, the ICC Trust Fund has been successful in "transformative" reparations and so perhaps it would be more suitable for the UN to channel funds into forward-thinking rehabilitative assistance mechanisms. Moreover, victims of sexual exploitation and abuse may want more than financial compensation.[227] As such,

[225] Although, sexual exploitation and abuse by peacekeepers may be distinguished from "war babies" as sexual exploitation and abuse does not necessarily happen during conflict (or even post-conflict), or be characterised as a war crime.
[226] 2006 Draft Strategy, above n 198, at [27].
[227] Bassiouni, above n 9, at 231.

reparations should go towards "re-humanising" victims.[228] For example, although the UN has established in-house training and awareness raising among their personnel about sexual exploitation and abuse,[229] nothing suggests that this has been linked to transforming communities or dismantling harmful masculinities that foster violence against women.

Working with local community organisations will help foster host state ownership over response systems. Moreover, it allows for flexible responses depending on the unique circumstances of each host state. However, for the UN to take leadership in implementing responses to victims of sexual exploitation and abuse by their peacekeepers there needs to be a fully comprehensive scheme in place. At the moment, the support in place for victims is highly dependent on the host state's established networks.

More research needs to be done in the area of "peacekeeping babies". Children born out of sexual exploitation and abuse may need specific kinds of support and should be included in any forward-thinking reparations.

(E) Reparations and Assistance for Victims of Sexual Exploitation and Abuse

In addition to victim participation under a hybrid court for peacekeepers, I argue that the UN should also implement a reparation scheme in response to sexual exploitation and abuse. Moreover, the UN should also expand on the Strategy for assistance to provide adequate support for victims and their communities.

Whereas under the status quo a victim of sexual exploitation and abuse may not receive any support (as such assistance is inconsistent across host states), a UN body existing alongside

[228] At 231.
[229] See for example, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* (2015), above n 208, at [76]-[79].

a hybrid court for peacekeepers might be able to fill that gap and apply reparations and assistance more evenly across host states. As sexual exploitation and abuse involves human rights violations it would be prudent to follow the trend for reparations as part of an effective remedy. This would mean reparations that are transformative in nature and focus on dismantling structural inequalities (both within peacekeeping operations and the host state) that foster violence against women.

Within the host state, in order to achieve inclusivity and to follow international best practice, the UN can facilitate transformative reparations through local networks and organisations. In response to sexual exploitation and abuse, these reparations might be the provision of safe houses for victims of sexual violence or the implementation of vocational training for women, in order to foster more economic opportunities that are not transactional sex. Within peacekeeping itself, the UN might focus on addressing harmful masculinities within military forces that support a culture of discrimination against women and a reluctance to enforce standards. This may include further sensitising personnel to sexual exploitation and cultural and social factors that lead to abuse. It may be appropriate that individual victims under a hybrid court for peacekeepers also be awarded reparations, such as compensation. Under the status quo, victims of sexual exploitation and abuse receive nothing.

CONCLUSION: RESPONDING TO VICTIMS OF SEXUAL EXPLOITATION AND ABUSE

The response to victims of sexual exploitation and abuse should be closely aligned with the principles I identified in Part One: justice being seen to be done, host state ownership and UN leadership. In order to improve accountability for victims, their communities, and host

states, these guiding principles should ensure a response centred on inclusivity, legitimacy and transparency. Below I have outlined the summaries of the two broad categories of responses to victims; participation during the criminal process and effective remedies.

(A) PARTICIPATION

For a special court for peacekeepers I argue it is necessary to incorporate victims of sexual exploitation and abuse into the process where appropriate. There appears to be an overall trend in international criminal justice towards giving victims a greater role. Moreover, incorporation of victims into the process supports the principle that justice should be seen to be done. Arguably, the mixed reparative-retributive model of the International Criminal Court is an appropriate guide to implementing victim participatory rights. Such rights include the right to information, the right to be heard, and the protection in which to fully participate. These rights closely align with the principles of host state ownership and justice being seen to be done, as well as being inclusive and transparent.

The right to information can be addressed in two ways; awareness raising of sexual exploitation and abuse generally in order to sensitise communities to such conduct and to inform victims of their rights, the criminal process, and possible outcomes. The UN can take leadership here in the countries in which the organisation operates. The right to be heard can be incorporated by allowing for victims' views to be expressed or considered before and during trial. Allowing victims to be heard can have both an empowering and rehabilitative effect, especially for vulnerable or marginalised groups (aligning with international human rights norms relating to effective remedies). The rights of victims must be however balanced with the rights of the accused to a fair trial.

Safety is also an important aspect to victim participation. Victims of sexual crimes may be especially reluctant to face their perpetrators directly. This can be compounded if these

victims are subject to marginalisation or discrimination based on gender or wider structural oppression. Participation should be voluntary as some victims might be re-traumatised through engaging with the criminal justice system. A special court for peacekeepers would need to ensure the protection (physically, mentally, and emotionally) of both victims and witnesses.

(B) REPARATIONS

Under various human rights norms, victims of sexual exploitation and abuse have a right to effective remedies. For remedies to be "effective" they need to be made available and be enforceable. In responding to violence against women (which covers all forms of sexual exploitation and abuse) human rights bodies have focussed on rehabilitative and transformative reparations. Not only should victims have access to immediate and emergency material care (medical, legal and psychological) but also long-term or forward-thinking reparations (such as education and vocational skills). Moreover, responses should take into consideration the wider context; reparations should not enforce pre-existing societal or cultural structures that foster gendered violence but instead aim to dismantle them. This includes negative stereotypes associated with hyper-masculinity in military forces (within peacekeeping) and also within the local community in which the UN operates.

The UN should take leadership in responding to victims of sexual exploitation and abuse. Arguably, the current UN Strategy for victims of sexual exploitation and abuse is not an adequate response. The Strategy itself has yet to be fully implemented and focusses on immediate or emergency care rather than long-term or forward-looking support. However, the Strategy's preference for working with local organisations in order to provide support and assistance to victims represents international best practice. Moreover, working with

networks within the host state, and involving victims and communities themselves in development, supports the principle of host state ownership and bolsters legitimacy.

Finally, the definition of victims under the UN Strategy is narrowly linked to individual harm.[230] Under the International Criminal Court and its Trust Fund for Victims, the definition recognises that the harm associated with human rights crimes can extend beyond the individual victim.[231] Although sexual exploitation and abuse will directly harm the individual victim, such crimes can affect their family and the host state community. This is compounded by the fact that sexual abuse is committed by UN peacekeepers who are there to provide assistance and help prevent harm to the local population. By extending the definition of victims under the Strategy, the UN may be able to encapsulate the reality of the harm caused by sexual exploitation and abuse. Moreover, provision of transformative reparations can be more easily supported and legitimised.

[230] UN Strategy, above n 183, at [5(d)]: "Victims: Persons whose claims that they have been sexually exploited or abused by United Nations Staff or related personnel have been established through a United Nations administrative process or Member States' processes, as appropriate."
[231] Rules of Procedure and Evidence, above n 47, at Rule 85.

CONCLUSION TO PART FOUR

The three conceptual principles underling this thesis (justice being seen to be done, host state ownership, and UN leadership) are about inclusivity, legitimacy, and transparency. From the viewpoint of victims, their communities, and the host state, I have argued that a hybrid tribunal for peacekeepers best serves these principles.

Unlike the status quo where victims and the host state (and the international community generally) are often ignorant regarding the outcome of sexual exploitation and abuse allegations, a hybrid tribunal operating within the host state itself will ensure justice is seen to be done. Embracing a structure that facilitates cooperation between the UN, TCCs and the host state will ensure both UN leadership and host state ownership. The jurisdiction of a hybrid court will also address the obligations under human rights law to criminalise, investigate and prosecute violence against women.

A primary difference between my argued model of a hybrid tribunal and models argued in previous scholarship is the removal of TCC exclusive criminal jurisdiction. Instead of a court of "last resort" I have argued for a court of first instance with jurisdiction over sexual exploitation and abuse. A court with secondary jurisdiction will not materially change the accountability gap as TCCs would have to be deemed "unwilling and unable" to exercise jurisdiction. The evidence needed to prove a state was "unwilling" or "unable" to investigate or prosecute would cause lengthy delay and such delay would hinder the chances of successful prosecution. It would not improve accountability.

Moreover, to align with human rights standards involving violence against women, it is necessary for the UN (or a hybrid court) to provide transformative reparations to victims. Unlike the current system where a victim of sexual exploitation and abuse may receive no

support or assistance, the UN should also implement standardised measures of assistance and reparations. Transformative reparations should target structural inequalities that support gendered violence within the host state (through local networks) and within peacekeeping itself. These measures will bolster the integrity of the UN as a human rights promoter, and bring legitimacy to its responses to sexual exploitation and abuse.

PART FIVE: CONCLUSION AND FINAL RECOMMENDATIONS

CONCLUSION

The aim of this thesis was to explore various ways in which the United Nations can improve accountability for sexual exploitation and abuse committed by military contingent members within its peacekeeping personnel. Under the status quo, the troop-contributing country has exclusive criminal jurisdiction over its military forces, currently preventing the UN from doing more than repatriating individual offenders. Ultimately, criminal investigation and prosecution is up to the whim of the particular TCC, and successful (or thorough) investigations and prosecutions have been few and far between. Instead, there is a culture of silence and a reluctance to enforce standards. The result is impunity and a lack of justice for victims and their communities. In this thesis I am seeking options for greater accountability to victims, their communities, and the host state. Moreover, I am focussing on the United Nations' role in improving accountability.

Past UN reforms aimed at increasing accountability have made some progress, but have not gone far enough to address the accountability gap. Drawing on previous scholarship and UN official reports, there are three broad categories of avenues for improvement; firstly that the UN should sanction states which do not investigate and prosecute their national personnel for sexual exploitation and abuse; secondly, alternative mechanisms to investigate and prosecute military contingent members should be pursued; and thirdly, victims should receive reparations and better assistance and support from the UN.

Applying a feminist lens, I assessed these broad categories guided by three underlying principles. These principles are justice being seen to be done, host state ownership, and UN

leadership. These principles are about legitimacy and transparency in response to sexual exploitation and abuse, and inclusivity of the host state. Part Five summarises the key findings of this assessment.

KEY CONCLUSIONS OF THE THESIS

Having unpacked the UN's definition of "sexual abuse" and "sexual exploitation", Chapter Two illustrated that the definition of "sexual exploitation" is conceptually flawed and ambiguous. Taking a blanket prohibition on all transactional sex shuts down any engagement with the many reasons why local women engage in such transactions and diverts the focus away from the very relevant contextual issues (such as extreme poverty and harmful masculinities associated with militaries). Taking an anti-essentialist and intersectional feminist lens in Part One, I argued that not all transactional sex is necessarily "exploitative"; however the context of differential power that exists between peacekeepers and the local population cannot be ignored. Where sex is exchanged for assistance that peacekeepers have access to or which is otherwise owed to the local people, the abuse of trust and power in such a situation is exploitation. Therefore, in this thesis I took "sexual exploitation" to mean "survival sex".

In Part Two, I investigated whether the UN could or should sanction troop-contributing countries which fail to investigate and prosecute their nationals and made the following arguments; firstly, that there are obligations on states to exercise criminal jurisdiction when their military contingent members commit sexual exploitation and abuse. These obligations may be identified in the Memorandum of Understanding (between the UN and the troop-contributing countries) and under international human rights law. Secondly, although these obligations exist, the coercive measures suggested by academics and UN officials (withdrawing troops and blacklisting states) fall outside legally endorsed responses (within

countermeasures). Thus, the laws of state responsibility and the responsibility of international organisations are not helpful in trying to achieve greater accountability. Coercive measures may still be employed as part of the "political strategies" of the UN, and may be the likely direction taken, in addition to naming and shaming states. However, it would seem that this "top-down" approach is not sufficient and only delivers a partial response. The three conceptual principles are not reflected in these measures; although they involve UN leadership, they do not achieve justice being seen to be done and do not involve host state ownership.

Part Three demonstrated that the conceptual principles may be better served by host state jurisdiction. Trials performed within the victim's community will assure that justice is seen to be done, and the host state would have at least some ownership over that process. However, host state jurisdiction may not always be possible, for example the host state may be in a post-conflict situation and be without a fully functioning criminal justice system. Instead, host state jurisdiction may need to be facilitated by an internationally-mandated structure. Part Three also considered the International Criminal Court. Although the ICC offers an existing formal structure for investigation and prosecution, it has too many limitations in the context of sexual exploitation and abuse by Peacekeepers. It is unlikely that this conduct would fulfil the tightly defined crimes listed under the Rome Statute or be included as a separate crime. The complementarity principle means that the ICC may have secondary jurisdiction, however the required evidence to prove that a state is "unable" or "unwilling" to prosecute their nationals would mean long delays. Finally, the discretion of the ICC Prosecutor favours prosecution of high-ranking officials in cases with a large number of victims. Overall, Part Three illustrated that while alternative mechanisms are desirable, sole host state ownership and the ICC are ultimately unsatisfactory and unlikely to improve accountability.

Part Four argued for a special court for peacekeepers. To improve accountability and provide a structure for facilitating aspects of host state jurisdiction (if applicable), it may be necessary to consider a hybrid tribunal for peacekeepers.

A hybrid tribunal fulfils all three of my guiding conceptual principles. Justice is "seen to be done" because the tribunal would operate within the territory where the crime took place and would be witnessed by the victim and their community. Where appropriate, mixed personnel in investigation, prosecution, and day-to-day running of the court, including the host state community, would ensure host state ownership. UN leadership should be facilitated by administration of such a tribunal and initiation of a treaty or negotiation process in which to legally base a tribunal of this kind. A hybrid tribunal would offer a solution in which accountability for sexual exploitation and abuse is seen to be legitimate, is inclusive of victims, and is transparent to the international community.

However, I also argued that a hybrid tribunal should have jurisdiction over military contingent members i.e. a court in the first instance. A court with secondary jurisdiction will not materially change the accountability gap as TCCs would have to be deemed "unwilling and unable" to exercise jurisdiction. The evidence needed to prove a state was "unwilling" or "unable" to investigate and/or prosecute would cause lengthy delay and such delay would hinder the chances of successful prosecution. Where past UN reforms have seemingly failed to improve accountability for sexual exploitation and abuse, it is perhaps time for member states to reconsider TCC exclusive criminal jurisdiction over their troops.

In addition, Part Four considered the role of victims and argued for the participation of victims in a hybrid court for peacekeepers and the provision of transformative reparations. In an effort to achieve inclusivity of victims and bring further legitimacy to the criminal justice system, a hybrid court should also include restorative elements. This may mean the

realisation of victim participatory rights, such as the right to be heard, the right to information, and the right to be protected.

Under the status quo, victims rarely receive any support. Therefore, Part Four argued that the United Nations should implement transformative reparations; ie forward-looking reparations aimed at dismantling structural inequalities that manifest gendered and sexual violence. In the context of peacekeeping, this may mean sensitising personnel to sexual exploitation and abuse and breaking down harmful masculinities that can exist within military forces. Moreover, UN partnering with local (host state) networks that provide emergency and long-term support for victims should be prioritised (in order to link with the principle of host state ownership).

In the next section I offer three broad recommendations based on these conclusions.

RECOMMENDATIONS

(1) RECOMMENDATION: THE DEFINITION OF "SEXUAL EXPLOITATION" NEEDS TO BE RE-DRAFTED TO REFLECT THE PRIMARY TARGETED CONDUCT – SURVIVAL SEX

- As a general comment, there is a notable gap in current international human rights law regarding survival sex.
- The official definition of "sexual exploitation" under the Secretary-General's Bulletin *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* needs to be redrafted or reconceptualised in order to reflect survival sex.
- In an effort to re-draft the definition, the United Nations should engage in conversations about women's agency in transactional sex involving their peacekeeping personnel. Thus, additional relevant empirical research should be conducted.
- A new definition of "sexual exploitation" could be drawn from the reconceptualised definition used throughout this thesis; ie "sexual exploitation" as survival sex – specifically where sex is exchanged for assistance to which peacekeepers have access or which is already owed to the local population.

(2) RECOMMENDATION: UN MEMBER STATES SHOULD CONSIDER A HYBRID TRIBUNAL FOR PEACEKEEPERS IN ORDER TO PROSECUTE CASES OF SEXUAL EXPLOITATION AND ABUSE

- This hybrid tribunal should be a court in the first instance rather than a court of "last resort".
- A hybrid tribunal could be legally based on an international instrument, embracing an "opt-in" or "opt-out" measure.

- The structure of the hybrid court should aim to support host state ownership and inclusivity (where appropriate).
- An agreed procedure for investigation should be standardised and streamlined (ie one formal body to investigate).
- A roster of relevant experts should be made available from which to draw international personnel.
- A centralised registrar within the UN should be appointed, and such individual(s) should be mutually agreed by troop-contributing countries and host states.
- The above re-drafted definition of sexual exploitation (and sexual abuse) should be included within the material jurisdiction of a hybrid court.
- Victims should be consulted about charges, and have participatory rights realised. In addition, victims' safety before and during trial should be prioritised.

(3) RECOMMENDATION: THE UN SHOULD IMPLEMENT A REPARATION SCHEME AND INCREASED ASSISTANCE AND SUPPORT FOR VICTIMS

- A hybrid court should have the ability to award individual reparations.
- In addition, the United Nations should implement rehabilitative reparations through local networks, such as safe houses for women who have suffered sexual violence.
- Transformative reparations can also be used to address the context in which sexual exploitation and abuse occur, notably the socio-economic environment of the local population and the harmful masculinities that may be present within peacekeeping operations themselves.

It has been over a decade since the reports of sexual exploitation and abuse committed by UN peacekeepers in the Democratic Republic of Congo prompted the UN to take action in

terms of institutional reforms. Reforms so far have failed to adequately improve accountability. A number of official reports indicate that there continues to be a culture of sexual exploitation within peacekeeping and reluctance to enforce standards. The time has come for serious consideration of a “hybrid” solution to improve accountability of offenders and justice for victims.

POSTSCRIPT

During the final stages of this thesis, the UN-requested Independent Review Panel report was released (17 December 2015) which directly relates to sexual exploitation and abuse by peacekeepers. As I am unable to offer extensive comment on this report due to time constraints, the following is an initial discussion regarding the report's key recommendations relating to improving accountability of peacekeepers who commit sexual exploitation and abuse. This postscript is written within the same conceptual framework as the rest of the thesis; ie I apply a feminist lens, and am guided by the three underlying principles of justice being seen to be done, host state ownership, and UN leadership.

INDEPENDENT REVIEW PANEL REPORT (2015)

In April 2015, a report leaked by an NGO[1] revealed year-old allegations against French peacekeepers in the Central African Republic (CAR) for the sexual abuse of local children.[2] The report further indicated that no investigation had been conducted by France. Moreover, the whistleblower of the allegations was promptly disciplined by the UN.[3] After this report was caught by world media, French authorities launched an official investigation.[4] As a result of the apparent lack of interest in following up these allegations when first reported, the UN requested an independent review of these sexual abuse allegations and the current response mechanism.[5] The Independent Review Panel released its report in December

[1] AIDS-Free World.
[2] Dr T Awori, Dr C Lutz and General P J Thapa *Final Report: Expert Mission to Evaluate Risks to SEA Prevention Efforts in MINUSTAH, UNMIL, MONUSCO, and UNMISS* (2013) leaked by AIDS-Free World March 2015 see AIDS-Free World *Open Letter to Ambassadors of All United Nations Member States* (16 March 2015) <www.aidsfreeworld.org>.
[3] The whistleblower was vindicated months later see Colum Lynch "The UN Official Who Blew the Lid off Central African Republic Sex Scandal Vindicated" (17 December 2015) *Foreign Policy* <www.foreignpolicy.com>.
[4] K Willsher and S Laville "France Launches Criminal Inquiry into Alleged Sex Abuse by Peacekeepers" *The Guardian* (7 May 2015) http://www.theguardian.com/world.
[5] "Panel to Review UN Reponses to Alleged Central African Republic Sex Abuse" *The Guardian* (22 June 2015).

2015.[6] The UN is currently considering this report and an initial response is expected sometime in February 2016.

The Independent Review Panel indicated serious flaws in the response to these particular allegations and implicated failings across many UN agencies, including UNICEF, the head of the UN mission in the Central African Republic, and the UN human rights staff operating in CAR.[7] With these apparent failings in mind, the Panel made recommendations aimed to improve the response to sexual exploitation and abuse committed by all categories of UN peacekeeping personnel. In particular, the Panel was interested in centralising the role of the UN in its response to allegations.

The relevant recommendations are:[8]

- Acknowledge that sexual exploitation and abuse by peacekeepers, whether or not the alleged perpetrator is under UN command, is a form of conflict related sexual violence to be addressed under the UN's human rights policies.
- Create a Coordination Unit in OHCHR reporting directly to the High Commissioner for Human Rights to oversee and coordinate responses to conflict related sexual violence, including:
    - Monitoring, reporting and follow up on allegations of sexual abuse;
    - Analysing data with a view to tracking trends and practices for the purpose of improving prevention and accountability; and
    - Following up on the implementation of the Panel's recommendations.

[6] M Deschamps, H B Jallow and Y Sooka *Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic* (December, 2015).
[7] At i.
[8] At xv-xvi.

- Create a working group to support the Coordination Unit made up of experts (including specialists skilled in addressing sexual violence by international forces), and representatives of TCCs. The working group should:
    - Develop a single policy harmonising the sexual exploitation and abuse and human rights policies; and
    - Develop processes promoting criminal accountability for sexual violence.
- Establish, under the authority of the Coordination Unit, a professional investigative team available for immediate deployment when conflict related sexual violence by peacekeepers is reported.
- Establish a Trust Fund to provide specialised services to victims of conflict related sexual violence.
- Negotiate with TCCs provisions ensuring prosecution, including by granting host state countries subsidiary jurisdiction to prosecute crimes of sexual violence by peacekeepers.

THE RECONCEPTUALISATION OF SEXUAL EXPLOITATION AND ABUSE AS CONFLICT RELATED SEXUAL VIOLENCE

The Panel's first recommendation calls for a reconceptualisation of sexual exploitation and abuse as "conflict related sexual violence". The Panel argued that with this change sexual abuse by peacekeepers would need to be directly addressed under the UN's human rights policies and that the UN would have obligations to "protect victims, report, and follow up on allegations" as a result.[9] Currently there are two parallel policies that may apply when peacekeepers commit serious misconduct involving human rights violations. The first is the

[9] At x.

zero-tolerance policy represented by the S-G Bulletin (if sexual exploitation and abuse)[10] and the second is the human rights policy framework flowing from multiple sources, including Security Council Resolutions on conflict related sexual violence.[11] According to the Panel, the isolation of sexual exploitation and abuse from general UN human rights policies denies the seriousness of such conduct and removes the UN's obligations to follow-up accountability.[12] The Panel has recommended that these two policies should be harmonised so the UN will be obligated to respond to sexual exploitation and abuse allegations in a "robust and meaningful way."[13] Such obligations include prompt investigation of allegations, reporting (internally and publically), and follow-up "irrespective of the affiliation of the perpetrator."[14] The discharge of these obligations would be within the mandate of the Office of the High Commissioner for Human Rights (OHCHR).[15]

Conflict-related sexual violence has been defined by the UN as the following:[16]

> Conflict-related sexual violence refers to incidents or patterns … of sexual violence, that is rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity against women, men or children. Such incidents or patters occur in conflict or post-conflict settings or other situation of concern (e.g. political strife). They also have a geographical and/or causal link. In addition to the international character

[10] At 22-27; United Nations Secretary-General's Bulletin *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* SG B ST/SGB/2003/13 (2003).
[11] For example, *Security Council Resolution 1820* SC S/Res/1820 (2008); *Security Resolution 1888* SC S/Res/1888 (2009); *Security Council Resolution 1889* SC S/Res/1889 (2009); *Security Council Resolution* 2106 SC S/Res/2106 (2013); *Security Council Resolution 2122* SC S/Res/2122 (2013).
[12] Deschamps, Jallow and Sooka, above n 6, at iii and x.
[13] At 27.
[14] At 27.
[15] At 27.
[16] Report of the Secretary-General *Conflict-Related Sexual Violence* GA A/66/657-S/2012/33 (2012) at [3].

> of the suspected crimes (which can, depending on the circumstances, constitute war crimes, crimes against humanity, acts of genocide or other gross violations of human rights), the link with conflict may be evident in the profile and motivations of the perpetrator(s), the profile of the victim(s), the climate of impunity/State collapse, cross-border dimensional and/or the fact that they violate the terms of a ceasefire agreement.

This is the definition also adopted by the Independent Review Panel. The Panel argued that sexual exploitation and abuse committed by peacekeepers (mostly international personnel) in a post-conflict setting such as the Central African Republic is conflict related sexual violence.[17] Sexual exploitation and abuse by peacekeepers has been commented on by the Global Study on Security Council Resolution 1325 and briefly included in some of the Security Council Resolutions on conflict related sexual violence.[18] This further supports the Panel's view that sexual exploitation and abuse should be reconceptualised as such.

Interestingly, the Panel does not offer or request that the definition of sexual exploitation and abuse itself be modified, but presumably intend that it be subsumed into the above definition of conflict related sexual violence. If the latter is the case, and the UN removed the current definition of sexual exploitation and abuse altogether and replaced it with its current policies regarding conflict related sexual violence, then many of the criticisms regarding "sexual exploitation" would be partially remedied. In particular, "sexual exploitation" under the S-G Bulletin has been criticised for being broad enough to potentially include consensual adult sexual relationships between peacekeepers and the local

[17] See Deschamps, Jallow and Sooka, above n 6, at 4-5.
[18] A Global Study on the Implementation of United nations Security Council Resolution 1325 *Preventing Conflict, Transforming Justice, Securing the Peace* (UN Women, 2015) at 132-157; see also *Security Council Resolution 1888*, above n 11.

population.[19] The definition of conflict related sexual violence does not include ambiguous phrasing about exchanging sex for assistance, nor does it include an emphasis on the equally ambiguous "exploitative relationships" as the S-G Bulletin does. Moreover, sexual slavery and enforced prostitution may possibly be interpreted to include survival-sex-type relationships (a key element of "sexual exploitation" in the S-G Bulletin).

In international criminal law, sexual slavery and enforced prostitution refer to situations where a woman or girl is forced to exchange sex for their own safety or survival.[20] In reality, these women may not be regarded as prostitutes; however, due to the context, where men might have the "dominant position of power" and access to the safety that victims are dependent on, the victim may be deemed a sexual slave.[21] Such a description can easily be compared with survival sex in peacekeeping missions. Peacekeepers are in a position of trust and have access to assistance and material goods that the local population does not. Moreover, survival sex creates a cycle of dependency.[22] However, as will be discussed below, sexual slavery and enforced prostitution are tied to a particular context and may in fact exclude young women who engage in survival sex with peacekeepers. Moreover, the Independent Review Panel was responding to allegations of sexual abuse of children, although the conduct under review resembled survival sex scenarios, the Panel's focus was clearly on the age of the victims in question.[23] The Panel did not consider survival sex in general or the question of young women engaging in survival sex.

[19] See discussion in Chapter Two: Concepts.
[20] N Quenivet "The Dissonance between the United Nations Zero Tolerance Policy and the Criminalisation of Sexual Offences on the International Level" (2007) 7 *International Criminal Law Review* 657 at 671.
[21] See Women's Caucus for Gender Justice in the International Criminal Court *Recommendations and Commentary* Preparatory Committee (December, 1997) PART III at WC.5.6.
[22] Secretary-General *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations* GA A/59/710 (2005), prepared by Prince Zeid Ra'ad Zeid Al-Hussein [Zeid Report] at [6].
[23] Deschamps, Jallow and Sooka, above n 6, at 4-8.

As noted above, the Security Council has in its Resolutions on conflict related sexual violence included sexual exploitation and abuse by peacekeepers, urging troop-contributing countries "to take appropriate action, including pre-deployment and in-theater awareness training, and other action to ensure full accountability in cases of such conduct involving their personnel."[24] Although seemingly acknowledging the link between sexual exploitation by peacekeepers and conflict related sexual violence, the Security Council places responsibility for criminal accountability solely on member states. This is in contrast to conflict related sexual violence more generally, in which the UN regularly investigates, monitors and reports on. Investigations are not criminal investigations as criminal accountability for conflict related sexual violence is still the responsibility of states. The UN monitors progress and outcomes of cases, and publicly reports its findings.

The definition of conflict related sexual violence is a working definition used by the UN in its effort to monitor and report on such conduct. Obligations on states to investigate and prosecute such conduct in domestic criminal law come from international human rights law and international humanitarian law (not the Security Council Resolutions on conflict related sexual violence). The UN's definition of conflict related sexual violence is much broader than the human rights and humanitarian treaties which provide obligations on states in relation to the conduct described. For example, forced prostitution and sexual slavery form part of the international crimes of crimes against humanity, genocide and war crimes.[25] These crimes have additional requirements, such as the conduct must form part of a systematic attack or a widespread policy to cause harm.[26] Although survival sex involving

[24] *Security Council Resolution 1820*, above n 11, at [7]. See also *Security Resolution 1888*, above n 11; *Security Council Resolution 1889*, above n 11; *Security Council Resolution*, above n 11; *Security Council Resolution 2122*, above n 11.
[25] Quenivet, above n 20, at 671.
[26] See *Rome Statute of the International Criminal Court* 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002) art 7.

peacekeepers in a post-conflict setting may sit with the UN's definition of conflict related sexual violence as forced prostitution (therefore placing obligations on the UN to respond in a particular way), the same conduct may not fulfil the high threshold of crimes against humanity (therefore states will not have obligations to respond in a particular way). The same conduct, of course, would be considered violence against women under international human rights law, so obligations on states to act in due diligence to investigate and prosecute may arise there. However, such obligations rely on the particular conduct (such as survival sex) being incorporated into domestic criminal law.

In sum, although the Panel's recommendation to reframe sexual exploitation and abuse as conflict related sexual violence centralises the role of the UN and places obligations on the UN to investigate, report and follow up with TCCs, it does not place additional obligations on states to exercise their criminal jurisdiction in regards to such conduct committed by their military personnel. The principle of UN leadership is clearly strengthened by this recommendation. This reconceptualisation would enable the UN to name and shame non-compliant TCCs in its public reports concerning conflict related sexual violence and thus add more political pressure on TCCs to hold their peacekeepers to account. Additionally, the transparency achieved by public reporting of allegations would further support accountability in the view of victims, the host state and the international community. However, criminal accountability is still up to the particular TCC and this recommendation does not, on its own, guarantee improving individual accountability; justice would not be seen to be done.

As a final note on this recommendation, it is not clear whether survival sex involving young women and peacekeepers would fall within the definition of conflict related sexual violence. Without further comment from the Panel on survival sex involving adults, the

reconceptualisation of sexual exploitation and abuse as conflict related sexual violence may leave adult victims of survival sex without justice. Such a conclusion is unacceptable. If this was the eventual result of the Panel's recommendation, then that would need to be remedied by redrafting the relevant definitions in order to explicitly include survival sex involving adults.

A Coordination Unit

A second recommendation closely linked to the reconceptualisation of sexual exploitation and abuse is the creation of a Coordination Unit (within the OHCHR) "to direct and coordinate the UN's response to all allegations" of conflict related sexual violence by peacekeepers.[27] The Coordination Unit would presumably take the place of the current Conduct and Discipline Teams (operating in the field) in informing the relevant TCCs and kick-starting the investigation process. Moreover, the Unit would be supported by a working group tasked with harmonising the UN's human rights policies with policies on sexual exploitation and abuse. The Unit would not only facilitate the response from TCCs and the UN but also be tasked with follow-up on cases and the communication of outcomes to victims and their communities.[28]

Upon receiving an allegation, investigations would be conducted by a team of experts specialised in conflict related sexual violence.[29] These teams would be promptly deployed in order to gather and preserve evidence, and be able to assist in criminal investigations.[30] Not only would these teams replace the Office of Internal Oversight Services' response to sexual exploitation and abuse, but be specialised enough to conduct criminal investigations.

[27] Deschamps, Jallow and Sooka, above n 6, at x.
[28] At 80.
[29] At 83.
[30] At 83.

The Panel does not indicate whether these teams would replace TCC investigation teams in allegations regarding military contingent members or whether they would be available only to assist.

Placing a central response framework within the OHCHR clearly supports this thesis' view that sexual exploitation and abuse is a human rights issue and requires a human rights approach. A central investigative team with expertise in crimes of a sexual nature would be beneficial as the current investigative structure is confusing and not specialised. It would also give a UN agency the capacity to conduct criminal investigations, further centralising the UN's role in responding to sexual exploitation and abuse. The Panel does not comment on the host state's possible role in these investigations, but does encourage direct and transparent communication and information sharing with victims and their communities, further supporting the participation of victims.

A Trust Fund for victims

The Panel confirms a victim's right to a remedy, and although the Panel also acknowledges that victims are entitled to individual reparations it instead recommends a Trust Fund specifically for the provision of rehabilitative services for victims.[31] The Panel does not comment further on the possible provision of other kinds of reparations, individual or otherwise. Nevertheless, this recommendation supports the argument that the UN should be doing more to protect victims and respond to victims' needs and that the UN is best placed to provide some form of remedies.

Host State Jurisdiction

[31] At 84-85.

Among its recommendations on individual accountability, the Panel suggests an alternative mechanism: granting host states secondary jurisdiction to prosecute.[32] The Panel based its suggestion on the practice of the North Atlantic Treaty Organisation (NATO), where its Status-of-Forces Agreements (SOFAs) are negotiated so as to grant secondary jurisdiction to host states where a troop-contributing country fails to exercise its primary jurisdiction.[33] This thesis considered such a proposal in Chapter Six, and although this option will provide host state ownership and victims could see justice being done, such a proposal does not offer a clear enough structure to facilitate UN, host state and TCC cooperation. Nevertheless, this recommendation further supports the impetus for an alternative mechanism to prosecute individual peacekeepers.

Preliminary Conclusions

In terms of its terms of reference, the Independent Review Panel draws on the specific context of the UN mission in the Central African Republic, a post-conflict state. The allegations under scrutiny exclusively involve the sexual abuse of children. The Panel does not discuss sexual exploitation, or survival sex involving adults. I suggest that this absence impacts on the recommendations of the Panel, as they seemingly do not consider both "sexual exploitation" and "sexual abuse" when reconceptualising this conduct as conflict related sexual violence (which underlies the rest of the Panel's recommendations).

The Panel makes several recommendations that attempt to centralise the role of the UN when responding to sexual exploitation and abuse committed by peacekeepers, thus further strengthening UN leadership. Host state ownership is also supported by the Panel's recommendation that host states should have secondary jurisdiction over crimes committed

[32] At 87-88.
[33] At 87.

by UN personnel on mission. Moreover, the report reinforces that victims are entitled to remedies and that the UN is best placed to provide them. However, the Panel's recommendations do not go far enough to fill the accountability gap and may leave adult victims of sexual exploitation without justice. Additionally, the Panel does not seem to explicitly challenge TCCs exclusive (or primary) criminal jurisdiction over their military contingent members or consider an alternative structure for individual criminal accountability, such as a hybrid court.

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